Docket for 03-583

(10)

No. 03-583
Title: Josue Leocal, Petitioner
v.
John D. Ashcroft, Attorney General, et al.
Docketed: October 20, 2003
Lower Ct: United States Court of Appeals for the Eleventh Circuit
Case Nos.: (02-14992)
Decision Date: June 30, 2003
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Sep 29 2003	Petition for a writ of certiorari filed. (Response due November 19, 2003)
Nov 14 2003	Order extending time to file response to petition to and including December 19, 2003.
Dec 10 2003	Order further extending time to file response to petition to and including January 5, 2004.
Jan 6 2004	Order further extending time to file response to petition to and including January 18, 2004.
Jan 20 2004	Brief of respondents John D. Ashcroft, Attorney General, et al. in opposition filed.
Feb 4 2004	DISTRIBUTED for Conference of February 20, 2004.
Feb 23 2004	Petition GRANTED.
Mar 17 2004	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including May 10, 2004.
May 7 2004	Brief amicus curiae of Midwest Immigrant & Human Rights Center filed.
May 10 2004	Brief of petitioner filed.
May 10 2004	Joint appendix filed.
May 10 2004	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
May 10 2004	Brief amici curiae of Citizens and Immigrants for Equal Justice, et al. filed.
Jun 10 2004	Extension of time within which to file respondent's brief on the merits to and including July 14, 2004.
Jul 14 2004	Brief of respondents John D. Ashcroft, Attorney General, et al. filed.
Aug 3 2004	Record received from U.S.C.A. 11th Circuit. (1 folder)
Aug 5 2004	CIRCULATED.
Aug 10 2004	Administrative Record received from Office of the Solicitor General. (1 folder)
Aug 18 2004	Reply of petitioner Josue Leocal filed. (Distributed)
Aug 24 2004	SET FOR ARGUMENT Tuesday, October 12, 2004.
Oct 12 2004	Argued. For petitioner: Joseph S. Sollers, III, Washington, D.C. For respondents: Dan Himmelfarb, Assistant to the Solicitor General, Department of Justice, Washington, D.C.

Supreme Court, U.S.
FILED

03 583 SEP 29 2003

No.

IN THE

Supreme Court of the United States

JOSUE LEOCAL,

Petitioner,

v.

UNITED STATES ATTORNEY GENERAL, IMMIGRATION AND NATURALIZATION SERVICE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The court below interpreted 18 U.S.C. § 16 to include DUI with serious bodily injury as a "crime of violence"—and therefore an "aggravated felony" as defined under § 101(a)(43)(F) of the Immigration and Nationality Act ("INA")—where the statute under which Petitioner was convicted required nothing more than negligence for conviction. That ruling conflicts with decisions of other United States Courts of Appeals and with the interpretation of the Board of Immigration Appeals ("BIA" or "Board"). The question presented is as follows:

Whether, in the absence of a *mens rea* of at least recklessness with respect to the active application of force against another, DUI with serious bodily injury is a "crime of violence" under 18 U.S.C. § 16 that constitutes an "aggravated felony" under § 101 of the INA?

LIST OF PARTIES

The caption of this case contains the names of all the parties to the proceedings in the courts below. Petitioner Josue Leocal was the petitioner before the Board of Immigration Appeals and in the court of appeals. Respondents the United States Attorney General and the Immigration and Naturalization Service were the respondents before the Board of Immigration Appeals and in the court of appeals.

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Petitioner respectfully petitions this Court to issue a writ of *certiorari* to the United States Court of Appeals for the Eleventh Circuit to review its decision in *Leocal v. U.S. Attorney General*.

OPINIONS BELOW

The opinion of the court of appeals is unreported and is reproduced at App. 5a-7a, *infra*. The opinion of the Board of Immigration Appeals is unreported and is reproduced at App. 1a-4a.

JURISDICTION

The court of appeals entered its judgment June 30, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The following statutory provisions are involved in this case. Section 16 of Title 18 of the United States Code defines "crime of violence," and it provides:

> The term "crime of violence" means --
>
> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force

against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 16.

The Florida statute under which Petitioner was convicted is Florida Statute § 316.193, which criminalizes driving under the influence. At issue is whether conviction under this statute constitutes a "crime of violence," as defined in 18 U.S.C. § 16, and therefore an "aggravated felony" as defined below in § 101 of the Immigration and Nationality Act ("INA"). Section 316.193 of the Florida statute provides, in pertinent part:

> (1) A person is guilty of the offense of driving under the influence and is subject to punishment . . . if the person is driving . . . a vehicle within this state and:
>
> > (a) The person is under the influence of alcoholic beverages . . . . * * *
>
> (3) Any person:
>
> > (a) Who is in violation of subsection (1);
> >
> > (b) Who operates a vehicle; and
> >
> > (c) Who, by reason of such operation, causes:
> > * * *
> >
> > > 2. Serious bodily injury to another, as defined in s. 316.1933, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Fla. Stat. § 316.193.

Section 101 of the INA defines an "aggravated felony," conviction for which makes an alien removable. Section 101 provides in pertinent part:

> (a) As used in this chapter--

> (43) The term "aggravated felony" means--
> > (F) a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment at least one year;

8 U.S.C. § 1101(A)(43)(F).

STATEMENT

Petitioner seeks review of the determination by the United States Court of Appeals for the Eleventh Circuit that driving under the influence ("DUI") with serious bodily injury constitutes a "crime of violence" under 18 U.S.C. § 16. It is well established that, although federal courts lack jurisdiction to review challenges to removal orders raised by certain classes of aliens, such as those convicted of "aggravated felonies" pursuant to Immigration and Nationality Act ("INA") § 237, 8 U.S.C. § 1252(a)(2)(C), federal courts have jurisdiction to determine their own jurisdiction, including whether an underlying conviction is a "crime of violence" under 18 U.S.C. § 16 and therefore an aggravated felony for purposes of INA § 242(a)(2)(C).

The Court of Appeals for the Eleventh Circuit concluded that it did not have jurisdiction to review the Board of Immigration Appeals' decision to remove Petitioner from the United States based on his conviction for DUI with serious bodily injury because another Eleventh Circuit panel had previously decided that DUI with serious bodily injury under Florida law is a "crime of violence."

The Eleventh Circuit's decision below that DUI with serious bodily injury constitutes a "crime of violence" under § 16 is contrary to the holdings of the majority of courts of appeals that have considered the issue. It also is contrary to

the BIA's current interpretation of § 16. The disparate treatment of aliens across the United States depending on where they reside does violence to the fundamental principle that immigration laws should be applied uniformly across the country. Review by this Court is warranted because the decision below is contrary to the interpretation of the BIA and the majority of circuits that have considered the issue, and because failure to review the decision will perpetuate the incongruous treatment of aliens across the country with respect to whether they are removable for DUI offenses.

A. Factual Background

Petitioner Josue Leocal is a 47-year-old man who lived in Miami, Florida after entering the United States from Haiti in August 1980 at the age of 24. In December 1987, Mr. Leocal became a lawful permanent resident. Mr. Leocal applied for naturalization in March 1997, but was found ineligible in August 2000. Mr. Leocal is married to a U.S. citizen, and has four children.

On January 7, 2000, following a car accident in Miami-Dade County in which two individuals were injured, Mr. Leocal was arrested, and he eventually pleaded guilty to two counts of driving under the influence of alcohol and causing serious bodily injury, in violation of Fla. Stat. § 316.193(3)(c)2. Although this was Mr. Leocal's first arrest in the 19 years he had resided in the United States, the circuit court for Dade County sentenced Mr. Leocal to 2.5 years in prison on the first count and 2.5 years of probation on the second.

After serving over two years of his sentence, during which time he completed a ten-month course of treatment for alcohol abuse, Mr. Leocal was released from prison into custody of the Immigration and Naturalization Service ("INS") in April 2002. On November 18, 2002, the INS removed Mr. Leocal to Haiti without notifying his counsel.

B. The Board of Immigration Appeals Decision

On November 22, 2000, Mr. Leocal received a notice to appear charging him as removable pursuant to INA, § 237(a)(2)(A)(iii) for having committed an "aggravated felony" as defined in INA § 101(a)(43)(F). The removal proceeding was based on Mr. Leocal's Florida conviction for DUI with serious bodily injury, Fla. Stat. § 316.193, which the INS claimed constituted a "crime of violence" as defined in 18 U.S.C. § 16. This "crime of violence" charge was the only charge contained in the notice to appear and the only asserted basis for Mr. Leocal's removal. App. 2a, 5a.

On October 16, 2001, an immigration judge ordered Mr. Leocal's removal to Haiti. In doing so, the immigration judge relied on *Le v. Attorney General*, 196 F.3d 1352 (11th Cir. 1999) (per curiam), in which the Eleventh Circuit appeared to defer to the Board's former interpretation of 18 U.S.C. § 16 that all DUI offenses are "crimes of violence" as set forth in *Matter of Puente*, Int. Dec. 3412 (BIA 1999), *withdrawn by Matter of Ramos*, 23 I. & N. Dec. 336 (BIA Apr. 4, 2002) (en banc). Mr. Leocal filed a timely notice of appeal to the Board on November 5, 2001. On April 24, 2002, the Board affirmed the immigration judge's decision and dismissed the appeal. Because of a clerical error, the decision was never served on Mr. Leocal or his counsel.

Prior to receiving notice that the Board already had issued its decision in the present case, counsel for Petitioner filed a supplemental brief arguing that the Board's recent decision in *Matter of Ramos*, 23 I. & N. Dec. 336 (BIA Apr. 4, 2002) (en banc), which withdrew the Board's former interpretation of § 16 as set forth in *Puente*, supported the conclusion that Mr. Leocal's Florida conviction was not a "crime of violence." On August 29, 2002, the Board reopened Mr. Leocal's case, vacated its April 24, 2002 decision, and issued a new decision, again affirming the

immigration judge's finding of removability. The Board reasoned that although *Ramos* supported Mr. Leocal's position, the Board nevertheless had to defer to the Eleventh Circuit's decision in *Le* because Mr. Leocal's case arose within the Eleventh Circuit. The Board thus deferred to *Le*, even though the Eleventh Circuit in *Le* itself had appeared to defer to the Board's now-rejected interpretation of § 16.

C. The Court of Appeals' Decision

Mr. Leocal petitioned the United States Court of Appeals for the Eleventh Circuit for review of the BIA's decision. The Eleventh Circuit dismissed the petition, agreeing with the government's argument that the court lacked jurisdiction over Mr. Leocal's case under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996), which limits judicial review of removal orders. App. 5a, 7a.

In dismissing Mr. Leocal's petition for review, the Eleventh Circuit held that its previous panel decision in *Le* was controlling despite the Board's new interpretation in *Ramos* of § 16 in the context of DUI cases, and despite the fact that *Le*, by its terms, had appeared to defer to the Board's now-withdrawn interpretation of § 16. Petitioner respectfully submits that, by incorrectly concluding that the court's prior decision in *Le* had decided that DUI offenses are "crimes of violence" under § 16, the Eleventh Circuit has perpetuated a significant split among the federal courts of appeals that has and will continue to undermine the uniform application of the immigration laws in the United States.

REASONS FOR GRANTING THE WRIT

This case squarely presents a question of substantial importance in the context of the immigration laws: whether a conviction for DUI with serious bodily injury (which

requires a *mens rea* of no more than negligence) constitutes a "crime of violence" under 18 U.S.C. § 16, a removable offense. The decision of the Eleventh Circuit is in direct conflict with the majority of appellate courts that have considered whether DUI offenses are "crimes of violence" absent a *mens rea* of at least recklessness with respect to the active application of force against another. The Eleventh Circuit's position also conflicts with the BIA's current interpretation of § 16 as articulated in *Ramos*. In light of the "strong interest in ensuring that aliens receive uniform treatment nationwide," this Court should issue a writ of certiorari to eliminate the incongruous treatment of aliens in different courts under the INA. *Ramos*, 23 I. & N. Dec. at 368.

I. THE DECISION BELOW PERPETUATES A SIGNIFICANT SPLIT AMONG THE CIRCUIT COURTS OF APPEALS

The United States Court of Appeals for the Eleventh Circuit held that it did not have jurisdiction to hear the Petitioner's appeal because in *Le v. Attorney General*, 196 F.3d 1352, 1354 (11th Cir. 1999), another panel of the Eleventh Circuit had previously found that DUI offenses qualify as "crimes of violence" under 18 U.S.C. § 16. App. 7a.

In so deciding, the Eleventh Circuit relied on its earlier decision in *Le* to conclude that it had previously interpreted § 16 as encompassing DUI offenses. In fact, as reflected by the way the court in *Le* framed the issue before it, as well as its own articulation of the standard of review that it applied, the court in *Le* deferred to the Board's now-

withdrawn interpretation of § 16 rather than deciding the issue itself. *See Le*, 196 F.3d at 1353-54.[1]

With the decision in this case, the Eleventh Circuit joined the minority of the circuits that have considered the issue. The majority of circuits to have considered the issue, by contrast, have concluded that DUI offenses are not "crimes of violence" absent a *mens rea* of at least recklessness with respect to the active application of force against another. The Eleventh Circuit's position also conflicts with the BIA's current position on this issue. *See Matter of Ramos*, 23 I. & N. Dec. 336, 346-47 (BIA Apr. 4, 2002); *United States v. Trinidad-Aquino*, 259 F.3d 1140,1145-46 (9th Cir. 2001); *Dalton v. Ashcroft*, 257 F.3d 200, 205-06 (2d Cir. 2001); *Bazan-Reyes v. INS*, 256 F.3d 600, 609-611 (7th Cir. 2001); *United States v. Chapa-Garza*, 243 F.3d 921, 926-27 (5th Cir. 2001).

A. The Majority Of Courts And The BIA Have Correctly Concluded That The "Use" of Force Against Another Requires The Active Application Of Force Against Another

By its terms, a "crime of violence" under § 16 must have an element of either "*use*, attempted *use*, or threatened *use* of physical force," against another, 18 U.S.C. § 16(a) (emphasis added), or the felony must present "a substantial risk that physical force...may be *used*," against another, *id.* at § 16(b) (emphasis added). Therefore, under either § 16(a)

[1] In his appeal to the Eleventh Circuit, Petitioner argued that the Eleventh Circuit had not independently decided this issue because the *Le* court had deferred to a repudiated BIA interpretation of § 16. The Eleventh Circuit disagreed, holding that it was bound by the *Le* court's determination of the issue.

or (b), Petitioner is only removable if his crime involved the element or risk of "use" of force against another.

The majority of courts that have addressed the question have held that DUI offenses do not qualify as "crimes of violence" under § 16 because they do not involve the volitional "use" of force that is required under both subsections of the statute. Rather, DUI offenses involve accidental results, rather than volitional actions amounting to the "use" of physical force or the risk that force will be "used", as those words are commonly understood in the English language. *See United States v. Trinidad-Aquino*, 259 F.3d 1140, 1146 (9th Cir. 2001) (deciding that DUI with bodily injury is not a "crime of violence" under either § 16(a) or § 16(b) because DUI offenses do not involve the "conscious disregard of potential physical impact on someone or something," as required for the "use" of force under § 16, as opposed to a "non-volitional negligence as to that impact"); *Bazan-Reyes v. INS*, 256 F.3d 600, 611 (7th Cir. 2001) (concluding that DUI offenses, including *homicide* involving intoxicated use of a vehicle, do not qualify as "crimes of violence" because the "use" of force language in both § 16(a) and § 16(b) refers to *intentional* physical force); *United States v. Chapa-Garza*, 243 F.3d 921, 927 (5th Cir. 2001) (concluding that DUI offenses are not "crimes of violence because they do not involve the "use" of force: "That section 16(b) refers only to that physical force that may be used to perpetrate the offense is in harmony with its requirement that the offender *intentionally* use the force against the person or property of another." (emphasis added);[2] *Dalton v. Ashcroft*, 257 F.3d 200, 207-08

[2] In a later sentencing guidelines case involving a provision that contained language similar to § 16(a), the Fifth Circuit held that a Texas statute's "requirement that the offender 'cause [] serious bodily injury' [as an element of an intoxication assault offense not involving DUI] encompasses a requirement that the offender use force to cause that injury." *United States v. Vargas-Duran*, 319 F.3d 194, 196-97 (5th Cir.

(2d Cir. 2001) (similar); *see also United States v. Parson*, 955 F.2d 858, 866 (3d Cir. 1992) (*dictum*). The majority of courts that have considered this issue have concluded that a DUI offense does not implicate the "use" of force against another, or the risk that force will be "used" against another, because DUI offenses do not require a *mens rea* of at least recklessness with respect to the active application of force against another. These courts therefore have held that DUI offenses do not qualify as "crimes of violence" for which aliens, such as Petitioner, can be removed under the "aggravated felony" provisions of the INA.

The BIA likewise has agreed that, for a DUI offense to constitute a "crime of violence," the DUI offense must involve a *mens rea* of at least recklessness with respect to the active application of force against another. *See Ramos*, 23 I. & N. Dec. 336 at 346-47.[3] Under the position of the

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2003). The court did not attempt to reconcile its holding with its analysis in *Chapa-Garza*, under which the Fifth Circuit addressed § 16(b) and explicitly recognized that the "use" of force, as commonly understood, refers to intentional conduct rather than the accidental causing of injury. *Chapa-Garza*, 243 F.3d at 926. Thus, *Vargas-Duran* depends on the fictional premise that the word "use" in U.S.S.G. §2L1.2 and 18 U.S.C. § 16(a) means something different from the word "use" in 18 U.S.C. § 16(b). The Fifth Circuit is tentatively scheduled to rehear *Vargas-Duran* en banc in late September, 2003.

[3] The Eleventh Circuit stated in *Le* that it had to defer to the Board's interpretation of § 16 if it was reasonable. *See Le*, 196 F.3d at 1353; *see also Chevron U.S.A, Inc. v. Natural Res. Def. Counsel, Inc.*, 467 U.S. 837, 843 (1984). In 1999, the BIA determined that all DUI offenses are "crimes of violence" under § 16. *See Matter of Puente*, Int. Dec. 3412 (BIA 1999) *withdrawn by Matter of Ramos*, 23 I. & N. Dec. 336 (BIA Apr. 4, 2002) (en banc). In 2002, however, the BIA renounced its previous interpretation of DUI offenses under §16, distinguishing "active violence" that requires volition from "accidental force," which does not satisfy §16's "use of force" requirement. *Ramos*, 23 I. & N. Dec. at 346. Thus, to the extent the Eleventh Circuit in *Le* did not independently interpret § 16, the court in the present case should have deferred to the BIA's interpretation of § 16 in *Ramos*. To the extent that the Eleventh

majority of the courts of appeals that have interpreted § 16, as well as the Board's interpretation of § 16, Petitioner's DUI conviction is not a "crime of violence" that should render him removable, nor should it deprive the federal courts of appeals of jurisdiction, because the Florida statute under which he was convicted requires nothing more than a *mens rea* of negligence for conviction. *State v. Hubbard*, 751 So.2d 552, 562-63 (Fla. 1999) (determining whether conviction for DUI *manslaughter* under Fla. Stat. § 316.193 requires a showing of negligence or is a strict liability offense); *Ursu v. INS*, 20 Fed. Appx. 702, 2001 WL 1182409 (9th Cir. Oct. 5, 2001) (noting that a person can violate Fla. Stat. 316.193(3) "by acting with a *mens rea* of negligence.").

In reaching their conclusions regarding the interpretation of § 16, the majority of courts and the Board properly have focused on the "use" of force language that is the crux of both § 16(a) and § 16(b). *See Trinidad-Aquino*, 259 F.3d at 1145 (analyzing § 16(a) and (b) in case involving DUI involving bodily injury); *Bazan-Reyes*, 256 F.3d at 606 (analyzing § 16(a) and (b) as applied to various DUI offenses, including DUI homicide); *Chapa-Garza*, 243 F.3d at 927 (analyzing § 16(b)); *Dalton*, 257 F.3d at 204-05 (analyzing § 16(b)); *see also Parson*, 955 F.2d at 866 (analyzing § 16(a)). These courts and the Board have correctly determined that, by requiring the "use" of force or the risk that force be "used" against another, both sections require more than the accidental causation of injury. *See Trinidad-Aquino*, 259 F.3d at 1145; *Bazan-Reyes*, 256 F.3d at 606; *see also Parson*, 955 F.2d at 866 (*dictum*).

Circuit in *Le* independently interpreted § 16 in *Le*, Petitioner respectfully submits that the Eleventh Circuit's interpretation of § 16 is plainly wrong when evaluated against the explicit "use . . . against" language in § 16 and the correct interpretations of § 16 by the other courts of appeals and the BIA.

The United States Court of Appeals for the Seventh Circuit explained in interpreting § 16(a), that "the word 'use' requires *volitional* conduct" because "[a]lthough a conviction for homicide by intoxicated use of a vehicle requires that the offender actually hit someone, it does not require that he *intentionally* used force to achieve that result." *Bazan-Reyes*, 256 F.3d at 609 (emphasis added). Similarly, in discussing § 16, the United States Court of Appeals for the Ninth Circuit noted, "[i]n ordinary, contemporary, and common parlance, the 'use' of something requires a *volitional* act." *Trinidad-Aquino*, 259 F.3d at 1145 (emphasis added) (holding that a conviction for DUI with bodily injury under a California statute, which requires no more than a *mens rea* of negligence, does not constitute a "crime of violence" under § 16).

In addressing § 16(b), courts have reached similar conclusions that DUI offenses do not qualify as "crimes of violence," because the risk of an accident occurring while a person drives under the influence does not satisfy § 16(b)'s requirement that there be a substantial risk that force may be "used" "against" another.

As it had with § 16(a), the Seventh Circuit in *Bazan-Reyes v. INS*, 256 F.3d 600 (7th Cir. 2001), held that even a DUI offense that resulted in a death did not qualify as a "crime of violence" under § 16(b). The Seventh Circuit concluded that "the language of § 16(b) simply does not support a finding that a risk that one object will apply force to another is enough to constitute a crime of violence." *Id.* at 611. Rather, "§ 16(b) only applies when the nature of an offense is such that there is a substantial likelihood that the perpetrator will *intentionally* employ physical force against another's person or property." *Id.* (internal quotation omitted and emphasis in original); *see also Chapa-Garza*, 243 F.3d at 925.

In *Dalton v. Ashcroft*, 257 F.3d 200 (2d Cir. 2001), the Second Circuit came to the same conclusion regarding the "risk" referred to in § 16(b). The court found that "the language of § 16(b) fails to capture the nature of the risk inherent in drunk driving. This risk is, notoriously, the risk of an ensuing accident; it is not the risk that the driver will 'use physical force' in the course of driving the vehicle." *Id.* at 206.

B. The Minority Position Completely Ignores The "Use . . . Against" Parlance In § 16, Or Conflates The Causation of Injury With The "Use" Of Force

The courts that have taken the minority position have ignored the crucial "use" language entirely, or have improperly conflated the causation of injury with the "use" of force required by the statute. The Eleventh Circuit in *Le*, for example, did not engage in "any analysis of whether the 'use . . . against' language requires a volitional act." *Trinidad-Aquino*, 259 F.3d at 1146; *see Le*, 196 F.3d at 1353-54.

Similarly, the Eighth Circuit relied on its previous decision in *United States v. Moore*, 38 F.3d 977, 979 (8th Cir. 1994) to conclude that DUI accidents resulting in death qualify as "crimes of violence." *Omar v. INS*, 298 F.3d 710, 716 (8th Cir. 2002). By focusing on the fact that criminal vehicular homicide "always result[s] in another's death," *Omar*, 298 F.3d at 720, however, the court in *Omar* inappropriately confused the *consequences* of the alien's act with the alien's underlying *conduct*. The court in *Omar* thus improperly "equate[d] the phrase 'risk that physical force may be used' with language Congress did not employ in § 16(b), 'risk that injury may occur.'" *Omar*, 298 F.3d at 722 (Heaney, C.J., dissenting); *see also Jobson v. Ashcroft*, 326 F.3d 367, 375 (2d Cir. 2003) (recognizing that "simply relying on the fact of the resulting harm conflates the risk of

use of force with the risk of physical injury, which is not consistent with the language of section 16(b)").[4]

In sum, the Eleventh Circuit's decision in the present case improperly ignores the "use . . . against" language" that is the crux of § 16, and upon which the majority of courts have focused to conclude that DUI offenses are not "crimes of violence" absent a *mens rea* of at least recklessness with respect to the active application of force against another. In so doing, the Eleventh Circuit has exacerbated a split in the circuits and has taken a position that is squarely at odds with the well reasoned decisions of the BIA and the majority of courts to have addressed the issue.

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[4] Before the en banc Board decided *Ramos* in 2002, the Tenth Circuit, in *Tapia Garcia v. INS*, 237 F.3d 1216, 1221 (10th Cir. 2001), deferred to the BIA's pre-*Ramos* interpretation of § 16 and held that DUI satisfies § 16(b). The Tenth Circuit interpreted § 16(b) in reliance on cases addressing a Sentencing Guidelines provision that the Tenth Circuit incorrectly found to be "similar to that of 18 U.S.C. § 16(b)." *Id.* at 1222. Section 4B1.2(a)(2) of the Guideline provision, which the Tenth Circuit invoked, differs in a critical respect from § 16(b) because it does not include the key term "use"—unlike § 16(b), § 4B1.2(a)(2) requires only a risk of "physical injury to another." *See Tapia Garcia*, 237 F.3d at 1222-23 & n.6. Other courts have recognized that § 16(b) and § 4B1.2(a)(2) are not interchangeable and have squarely rejected the Tenth Circuit's position: "Contrary to the government's assertion that the language of [the sentencing guidelines provision] and § 16(b) are substantially similar, a side-by-side comparison reveals significant differences between the language of the two provisions." *Bazan-Reyes*, 256 F.3d at 610; *accord Chapa-Garza*, 243 F.3d at 925; *Parson*, 955 F.2d at 865-66; *cf. Dalton*, 257 F.3d at 208 n.9 ("[w]e remain to be persuaded by the [*Tapia Garcia*] court's reasoning").

II. THE FREQUENTLY-RECURRING QUESTION PRESENTED IN THIS CASE HAS EXCEPTIONAL PUBLIC IMPORTANCE FOR THE UNIFORM NATIONAL APPLICATION OF IMMIGRATION LAWS

The circuit split perpetuated by the Eleventh Circuit's decision below has widespread policy implications that severely undermine "the strong interest in ensuring that aliens receive uniform treatment nationwide." *Ramos*, 23 I. & N. Dec. at 346. Allowing the circuits to enforce disparate interpretations of § 16 as it applies to DUI offenses will subject permanent resident non-U.S. citizens, such as Petitioner, to a rule of law based on geographic happenstance. To allow an alien's rights to depend on the fortuity of where he or she lives would contradict the "important policy considerations [that] favor applying a uniform federal standard in adjudicating and determining the consequences of a conviction under the [INA]". *In re Crammond*, 23 I. & N. Dec. 9 (BIA 2001).

The extent to which geographic fortuity determines the rights of aliens affected by the application of § 16 to a DUI offense is crystallized by a comparison of how the Ninth and Eleventh Circuits have, for purposes of § 16, treated convictions differently under the *same* Florida statute. As noted, the Eleventh Circuit has held that a conviction for DUI with serious bodily injury under Fla. Stat. § 316.193(3)(c)2 constitutes a "crime of violence" under § 16. By contrast, the Ninth Circuit has held that a conviction for DUI *manslaughter* under the same Florida statute (Fla. Stat. § 316.193(3)) is not a "crime of violence" under § 16. *Ursu*, 20 Fed. Appx. at 704-05, 2001 WL 1182409 at *1. In short, had Petitioner happened to live in California, rather than Florida, the INS could not have instituted removal proceedings based on the same underlying conduct. But, because Petitioner lived in Florida, within the

Eleventh Circuit, the INS has already removed him from the country and has separated from his family, perhaps permanently.

A decade ago, the Eleventh Circuit articulated the need for uniformity in the application of immigration laws: "The laws that we administer and the cases we adjudicate often affect individuals in the most fundamental ways. We think that all would agree that to the greatest extent possible our immigration laws should be applied in a uniform manner nationwide . . . ." *Jaramillo v. INS*, 1 F.3d 1149, 1155 (11th Cir. 1993).

Other circuits have concurred in the Eleventh Circuit's recognition of the importance of this matter. *See, e.g., Sareang Ye v. INS*, 214 F.3d 1128, 1132 (9th Cir. 2000) ("We have repeatedly recognized that the immigration laws should be applied uniformly across the country, without regard to the nuances of state law"); *Moon Ho Kim v. INS*, 514 F.2d 179, 180-81 (D.C. Cir. 1975) (concluding that the "legislative history of the [INA] and the plethora of definitions incorporated in it . . . leave little doubt that Congress was seeking uniformity").

Congress has also recognized the importance of uniformity in the application of immigration laws. In the Immigration Reform and Control Act of 1986, Congress articulated the need for uniformity: "It is the sense of the Congress that . . . the immigration laws of the United States should be enforced vigorously and uniformly." Immigration Reform and Control Act of 1986, Pub. L. No. 99-603 § 115, 100 Stat. 3359, 3385 (1986).

In the face of the long-standing, fundamental policy of ensuring uniform application of the immigration laws and the number of aliens likely affected by the split of authority on the question presented, Petitioner respectfully submits that this Court should resolve the clear split among the circuits regarding whether convictions for DUI offenses

qualify as "crimes of violence" under § 16 and, thus, subject the alien to being removed. Only when this happens will the long-standing and fundamental policy of ensuring uniform application of the immigration laws be vindicated. This fact underscores the public importance of the question presented in this case.

CONCLUSION

For the reasons stated, *certiorari* should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX

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U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A24 665 605 - Orlando Date: AUG 2 9 2002

In re: JOSUE LEOCAL

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:
Jeffrey S. Bucholtz, Esquire,
Jeffrey T. Tao, Esquire
KING & SPALDING
1730 Pennsylvania Avenue, N.W.
Washington, DC 20006

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony

APPLICATION: Reopening

By order dated April 24, 2002, this Board summarily affirmed the Immigration Judge's decision, dated October 16, 2001, finding the respondent removable as charged, denying his application for withholding of removal under section 241(b)(3) of the Immigration and Nationality Act, denying his application for protection under Article 3 of

the Convention Against Torture (`the Convention"), 8 C.F.R. §§ 208.16-18 (2002), and ordering him removed to Haiti. Due to exceptional circumstances, however, we deem it appropriate to reopen the respondent's removal proceedings on our own motion, pursuant to 8 C.F.R. § 3.2(a).[1] Accordingly, we will vacate our April 24 decision and reinstate the respondent's appeal. We will also grant the respondent's motion to accept supplemental brief. The appeal will be dismissed.

As a threshold matter, we will address the respondent's challenge to the Immigration Judge's conclusion that he is removable as an alien convicted of an aggravated felony. On October 30, 2000, the respondent was convicted in the Circuit Court of Dade County, Florida, of the offense of driving under the influence with serious bodily injury, in violation of section 316.193(3)(c)(2) of the Florida Statutes, a third-degree felony for which he was sentenced to a 2'/2-year term of imprisonment. *Exh.* 2. On the basis of this offense, the Immigration and Naturalization Service charged the respondent with removability as an alien convicted of an aggravated felony. Section 237(a)(2)(A)(iii) of the Act. The Immigration Judge sustained the charge of removability. We affirm.

The United States Court of Appeals for the Eleventh Circuit, in whose jurisdiction this proceeding arises, holds that the Florida offense of driving under the influence with

[1] Due to a clerical error, our April 24, 2002, decision was not served upon the respondent in the manner prescribed by 8 C.F.R. § 3.1(f). We are satisfied that this error materially prejudiced the respondent, warranting sua sponte reopening. Because we have reopened the respondent's removal proceedings sua sponte, his July 12, 2002, motion seeking re-issuance of our April 24 order is denied as moot.

serious bodily injury is a "crime of violence" under 18 U.S.C. § 16(a) and an aggravated felony under section 101(a)(43)(F) of the Act. *Le v. U.S. Attorney General,* 196 F.3d 1352 (11th Cir. 1999). Because the respondent was convicted under the identical statute at issue in *Le,* we conclude that *Le* is controlling authority in this case.

We are unpersuaded by the respondent's argument, advanced in his supplemental appellate brief, that *Le* has been superseded, or at least rendered distinguishable, by this Board's recent precedent decision in *Matter of Ramos,* 23 I&N Dec. 336 (BIA 2002), where we held that the Massachusetts offense of driving under the influence of intoxicating liquor was not an aggravated felony. We clearly stated in *Matter of Ramos* that we would "follow the law of the circuit in those circuits that have addressed the question whether driving under the influence is a crime of violence." Id. at 346-47. We made this statement because the meaning of the term "crime of violence" under 18 U.S.C. § 16 is a matter of federal criminal law, and we have long recognized our obligation to defer to circuit court interpretations of provisions of federal criminal law. *Matter of Yanez,* 23 I&N Dec. 390, 396-97 (BIA 2002); *Matter of Anselmo,* 20 I&N Dec. 25 (BIA 1989). Thus, the circuits need not defer to our reading of 18 U.S.C. § 16. *Adams Fruit Co., Inc. v. Barrett,* 494 U.S. 638 (1990) (explaining that deference does not extend to an agency's interpretation of a judicially enforceable portion of a statute). Because we lack authority to unilaterally modify the law of the Eleventh Circuit as it relates to federal criminal statutes such as 18 U.S.C. § 16, we will follow *Le* and affirm the Immigration Judge's finding of removability.

We also affirm the Immigration Judge's conclusion that the respondent failed to satisfy his burden of proving eligibility for withholding of removal under section

241(b)(3) of the Act or protection under the Convention. Specifically, the respondent failed to demonstrate either that it is more likely than not that his life or freedom will be threatened in Haiti on account of a protected ground, or that he will more likely than not be tortured in Haiti by or with the consent or acquiescence of a public official acting in an official capacity. 8 C.F.R. §§ 208.16(b), 208.16(c), 208.18(a) (2002). Because we agree with the Immigration Judge's decision denying the respondent's requests for withholding and deferral of removal on the merits, we need not decide whether the respondent's conviction for an aggravated felony constitutes a "particularly serious crime" under section 241(b)(3)(B)(ii) of the Act, so as to render him ineligible for withholding of removal.

Accordingly, the following orders shall be issued.

ORDER: This Board's April 24, 2002, decision is vacated, and the removal proceedings are reopened pursuant to 8 C.F.R. § 3.2(a).

FURTHER ORDER: The respondent's motion to accept supplemental brief is granted.

FURTHER ORDER: The respondent's appeal is dismissed, and the respondent is ordered removed to Haiti.

/s Kevin A. Ohlson

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-14992
Non-Argument Calendar

Agency Docket No. A24-665-605

JOSUE LEOCAL,

Petitioner,

versus

U.S. ATTORNEY GENERAL,
IMMIGRATION AND NATURALIZATION
SERVICE,

Respondents.

On Petition for Review of A Final Decision of
the Board of Immigration Appeals

Before ANDERSON, BIRCH, and CARNES, Circuit Judges.

PER CURIAM:

Josue Leocal petitions for review of the Board of Immigration Appeals' ("BIA's") final removal order, entered August 29, 2002. The BIA ordered Leocal removed as an aggravated felon, finding that his conviction under Fla. Stat. § 316.193(3)(c)2 for driving under the influence ("DUI") causing serious bodily injury qualifies as a "crime of violence" under 18 U.S.C. § 16. The government, arguing that we lack jurisdiction, moved to dismiss the petition. We agree.

We review our subject-matter jurisdiction de novo. See Brooks v. Ashcroft, 283 F.3d 1268, 1272 (11th Cir. 2002).

As Leocal's removal proceedings commenced in 2000, the permanent rules of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996) ("IIRIRA") govern his petition for review. See e.g., Brooks, 283 F.3d at 1272, n. 4 (The IIRIRA applies to removal proceedings initiated after April 1, 1997). Under the IIRIRA, judicial review of removal orders is more limited than it had been under the Immigration and Nationality Act ("INA"). 8 U.S.C. § 1252(a)(2)(C); See Calcano-Martinez v. Immigration & Naturalization Serv., 533 U.S. 348, 350, 121 S.Ct. 2268, 2270 (2001); Brooks, 283 F.3d at 1272. Given the limits of § 1252(a)(2)(C), we retain jurisdiction only to determine whether Leocal is "(1) an alien (2) who is removable (3) based on a conviction for an offense enumerated in the statute."[1] Galindo-Del Valle v. Attorney General, 213 F.3d 594, 598 (11th Cir. 2000), cert. denied, 533 U.S. 949 (2001). Among those offenses enumerated in the statute is 8 U.S.C. § 1227(a)(2)(A)(iii), which allows for removal of an alien convicted of an aggravated felony after admission into the United States. Thus, if Leocal is an alien who is removable based on an aggravated felony conviction, § 1252(a)(2)(C) divests us of jurisdiction to review the removal order. Leocal does not dispute that he is an alien, so we turn to the question of whether his conviction renders him removable as an aggravated felon.

The INA defines the term "aggravated felony" as "a crime of violence (as defined in section 16 of Title 18, but

[1] Notwithstanding the jurisdictional bar in § 1252(a)(2)(C), we retain jurisdiction to consider "substantial constitutional issues" arising out of the alien's removal proceedings. See Brooks, 283 F.3d at 1273. Leocal does not raise any constitutional issues on appeal.

not including a purely political offense) for which the term of imprisonment is at least one year." 8 U.S.C. § 1101(a)(43)(F). Since Leocal received a 2 1/2 year prison sentence, the parties have focused on whether his conviction under Fla. Stat. § 316.193(3)(c)2 was for a "crime of violence" as defined by 18 U.S.C. § 16. In Le v. United States Attorney Gen., 196 F.3d 1352, 1354 (11th Cir. 1999), a panel of this Court squarely held that it is.

"[I]t is the firmly established rule of this Circuit that each succeeding panel is bound by the holding of the first panel to address an issue of law, unless and until that holding is overruled en banc, or by the Supreme Court." United States v. Hogan, 986 F.2d 1364, 1369 (11th Cir. 1993). Accordingly, Leocal's arguments as to the wisdom of the Le decision in light of BIA's new interpretation and the rulings of our sister Circuits are unavailing. Further, Leocal's arguments that we are not bound by Le because that panel deferred to the BIA's old interpretation are based on a misreading of Le. The Le Court did say that it would review the issue de novo but defer to a reasonable interpretation of the BIA. 196 F.23d at 1353-54. However, the Court's language and analysis clearly demonstrate that it made a binding, de novo determination that a DUI that causes serious bodily injury to another is a crime of violence. Id. at 1354.

We are divested of jurisdiction to review Leocal's removal order.

DISMISSED.

Supreme Court, U.S.
FILED
JAN 20 2004
OFFICE OF THE CLERK

(2)

No. 03-583

In the Supreme Court of the United States

JOSUE LEOCAL, PETITIONER

v.

JOHN D. ASHCROFT, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's conviction of driving under the influence and causing serious bodily injury, in violation of Fla. Stat. Ann. § 316.193(3)(c)(2), is a "crime of violence" under 18 U.S.C. 16(a) that renders petitioner removable under the immigration laws as an aggravated felon.

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In the Supreme Court of the United States

No. 03-583

JOSUE LEOCAL, PETITIONER

v.

JOHN D. ASHCROFT, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The per curiam order of the court of appeals (Pet. App. 5a-7a) is unreported. The decision of the Board of Immigration Appeals (Pet. App. 1a-4a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 2003. The petition for a writ of certiorari was filed on September 29, 2003 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a native and citizen of Haiti who arrived in the United States in 1980 and became a lawful permanent resident alien in 1987. See Pet. 4. In

October 2000, petitioner was convicted in Florida of driving under the influence (DUI) causing serious bodily injury to another, in violation of Fla. Stat. Ann. § 316.193(3)(c)(2) (West 2001). Petitioner was sentenced to two and one half years of imprisonment for that felony offense. Pet. App. 2a.

In November 2000, the Immigration and Naturalization Service (INS) commenced removal proceedings against petitioner based on his DUI conviction, which the INS alleged was an aggravated felony that renders petitioner removable from the United States under 8 U.S.C. 1227(a)(2)(A)(iii). Pet. App. 2a; Pet. 5. In October 2001, an immigration judge determined that petitioner is removable as charged by the INS. The immigration judge denied petitioner's applications for relief from removal because it determined that petitioner had failed to establish his eligibility for relief. Accordingly, the immigration judge ordered petitioner removed to Haiti. Pet. App. 2a, 3a-4a; Pet. 5.[1]

2. In August 2002, the Board of Immigration Appeals (BIA) sustained the immigration judge's decision and ordered petitioner removed to Haiti. Pet. App. 1a-

[1] On March 1, 2003, functions of several border and security agencies, including certain functions formerly performed within the Department of Justice by the INS were transferred to the Department of Homeland Security. See Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 441(2), 451(b), 116 Stat. 2192, 2196 (to be codified at 6 U.S.C. 251(2), 271(b)). The Attorney General remains responsible for the administrative adjudication of removal cases by immigration judges and the Board of Immigration Appeals. See *Aliens and Nationality; Homeland Security; Reorganization of Regulations*, 68 Fed. Reg. 9824, 9830-9846 (2003) (to be codified at 8 C.F.R. Pts. 1001-1337) (Justice Department implementing regulations as recodified after Homeland Security Act).

4a; see *id.* at 2a n.1 (discussing reopening of petitioner's appeal following faulty service of original BIA order).

In pertinent part, the BIA determined that petitioner's status as an aggravated felon was established by precedent of the Eleventh Circuit, within which petitioner's removal proceeding was conducted. Pet. App. 2a-3a. The BIA explained (*ibid.*) that in *Le* v. *U.S. Attorney General*, 196 F.3d 1352 (1999), the Eleventh Circuit had determined that a conviction of DUI causing serious bodily injury, in violation of Fla. Stat. Ann. § 316.193(3)(c)(2) (West 2001), is an "aggravated felony" under the immigration laws if the alien received a sentence of at least one year, because that offense is a "crime of violence" under 18 U.S.C. 16(a). *Le*, 196 F.3d at 1354; see 8 U.S.C. 1101(a)(43)(F) (defining "aggravated felony" to include crimes of violence under 18 U.S.C. 16 for which the term of imprisonment is at least one year). The BIA further explained that "the meaning of the term 'crime of violence' under 18 U.S.C. § 16 is a matter of federal criminal law" rather than immigration law, and the BIA therefore follows precedential interpretations of Section 16 by the relevant federal court of appeals (here, the Eleventh Circuit). Pet. App. 3a.

Petitioner did not seek a judicial stay of his removal. In November 2002, the INS removed petitioner to Haiti in accordance with the BIA's final order of removal. See Pet. 4. Petitioner's removal, however, did not itself prevent direct judicial review of petitioner's removal order. See *Moore* v. *Ashcroft*, 251 F.3d 919, 922 (11th Cir. 2001).

3. In an unpublished per curiam order, the Eleventh Circuit dismissed on jurisdictional grounds petitioner's petition for review of the BIA's decision. Pet. App. 5a-7a. The court of appeals determined that *Le* is binding

circuit precedent that constitutes a "*de novo* determination that a DUI that causes serious bodily injury to another is a crime of violence." *Id.* at 7a. The court thus concluded that petitioner is an aggravated felon based on his Florida conviction. Accordingly, the court held that its review of petitioner's removal order was barred under 8 U.S.C. 1252(a)(2)(C), which denies courts jurisdiction to review final orders of removal entered against aggravated felons and certain other criminal aliens. Pet. App. 6a-7a; see generally *INS* v. *St. Cyr*, 533 U.S. 289, 310-314 (2001) (determining that Section 1252(a)(2)(C) does not bar habeas corpus review of questions of law in removal proceedings).

ARGUMENT

Petitioner correctly observes (Pet. 8-14) that the courts of appeals have adopted differing approaches in applying the "crime of violence" definition of 18 U.S.C. 16 to state statutes that criminalize impaired driving that results in the death or injury of another. Whether or not that issue might warrant this Court's review in another case, it does not warrant review in this case. The petition for a writ of certiorari should be denied.

1. The definition of "aggravated felony" in the Immigration and Nationality Act, 8 U.S.C. 1101(a)(43)(F), provides that the term includes "a crime of violence (as defined in section 16 of title 18 * * *) for which the term of imprisonment [is] at least one year." 8 U.S.C. 1101(a)(43)(F) & note 3. Section 16 of Title 18 of the United States Code in turn defines a "crime of violence" as

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. 16.

2. Several courts of appeals have applied one or the other of the two paragraphs of 18 U.S.C. 16 to DUI convictions under state statutes that establish death or bodily injury as an element of the offense. In *Le* v. *U.S. Attorney General*, 196 F.3d 1352 (1999), and the instant unpublished decision, the Eleventh Circuit has determined that the offense of DUI causing serious bodily injury to another is a crime of violence under Section 16(a) "because one element of the offense includes the actual use of physical force" to cause the injury. *Id.* at 1354; see Pet. App. 7a. The Eleventh Circuit has not addressed whether DUI causing serious bodily injury is a crime of violence under Section 16(b). See *Le*, 196 F.3d at 1354.[2]

In *Bazan-Reyes* v. *INS*, 256 F.3d 600 (2001), the Seventh Circuit concluded that the Wisconsin offense of

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[2] In 1999, the Supreme Court of Florida determined that there is no scienter requirement for a conviction of DUI manslaughter under Fla. Stat. Ann. § 316.193(3)(c)(3), but there must be a causal connection between the death and the operation of the vehicle. See *State* v. *Hubbard*, 751 So.2d 552 (1999). The Florida Supreme Court observed that some States have established a scienter requirement such as negligence for DUI manslaughter, while others have made DUI manslaughter a "strict liability" offense. *Id.* at 559-560. The court additionally observed that "an argument could be made that a reasonable person would never drive while intoxicated, so therefore an intoxicated driver is presumptively negligent." *Id.* at 563 n.26. The Eleventh Circuit's decisions in *Le* and this case, however, do not turn on the presence or absence of a scienter requirement in the statute of conviction.

homicide by intoxicated use of a vehicle is not a crime of violence under Section 16(a) because, "[a]lthough a conviction for [that offense] requires that the offender actually hit someone, it does not require that he intentionally used force to achieve that result." *Id.* at 609. The Seventh Circuit further concluded in *Bazan-Reyes* that a conviction under the Wisconsin statute did not constitute a crime of violence under Section 16(b). Quoting the Fifth Circuit's decision in *United States* v. *Chapa-Garza*, 243 F.3d 921 (2001)—which involved convictions under a Texas statute that classifies third and subsequent convictions for ordinary DUI (*i.e.*, not DUI causing death or serious bodily injury) as felonies, see *id.* at 923 n.5—the Seventh Circuit stated that "§ 16(b) only applies 'when the nature of an offense is such that there is a substantial likelihood that the perpetrator will *intentionally* employ physical force against another's person or property in the commission thereof.'" *Bazan-Reyes*, 256 F.3d at 611 (quoting *Chapa-Garza*, 243 F.3d at 925).

In *Omar* v. *INS*, 298 F.3d 710 (2002), the Eighth Circuit rejected the reasoning of *Bazan-Reyes* and upheld a determination of the Board of Immigration Appeals that the Minnesota offense of vehicular homicide arising from DUI is a crime of violence under Section 16(b). Without considering the application of Section 16(a), the Eighth Circuit concluded that a conviction under that vehicular homicide statute satisfied Section 16(b) because "there are no circumstances where the offense of criminal vehicular homicide does not present a substantial risk that physical force will injure another." *Id.* at 718. Judge Heaney dissented, stating the view that Section 16(b) is ambiguous as applied to the Minnesota vehicular homicide statute and that it should be deemed not to apply on the facts of *Omar* because of the deportation context of that case. *Id.* at 720-723 (Heaney, J., dissenting).

The Ninth Circuit has held that the offense of DUI causing bodily injury to another is a crime of violence under 18 U.S.C. 16(a) and (b) if the statute of conviction requires that the defendant acted intentionally or recklessly, but not if the statute "can be violated through negligence alone." *United States* v. *Trinidad-Aquino*, 259 F.3d 1140, 1145, 1146 (9th Cir. 2001); see *Ursu* v. *INS*, 20 Fed. Appx. 702, 705 (9th Cir. 2001) (DUI manslaughter is not crime of violence under *Trinidad-Aquino*). Judge Kozinski dissented in *Trinidad-Aquino*, reasoning that "[d]riving a vehicle while intoxicated and then killing or injuring somebody is the classic example of an offense that 'by its nature, involves a substantial risk' that physical force will be used against another" and, accordingly, constitutes a crime of violence under Section 16(b). 259 F.3d at 1147 (Kozinski, J., dissenting) (quoting 18 U.S.C. 16(b)).

In an unpublished decision, the Sixth Circuit stated that the Indiana offense of DUI resulting in the death of another person is a crime of violence under both Section 16(a) and Section 16(b). *United States* v. *Santana-Garcia*, No. 98-2234, 2000 WL 491510 *2 (2000) (noted at 211 F.3d 1271 (Table)).

3. As the foregoing discussion demonstrates, the application of 18 U.S.C. 16 to felony DUI convictions that include death or bodily injury as an element of the offense presents difficult questions under Section 16(a) as well as under Section 16(b). This case presents *only* an application of Section 16(a). The BIA ordered petitioner removed on the basis that his Florida conviction is an aggravated felony under Section 16(a) in light of *Le*. Pet. App. 2a-3a. The court of appeals similarly dismissed the petition for review in light of *Le*, which

expressly did not interpret or apply Section 16(b). *Id.* at 7a; see *Le*, 196 F.3d at 1354. The application of Section 16(b) to petitioner's Florida conviction is an issue that has not been addressed below and, accordingly, should not be reviewed by this Court. See *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999) ("[W]e do not decide in the first instance issues not decided below."); *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 379 n.5 (1996) ("[W]e generally do not address arguments that were not the basis for the decision below.").

The court of appeals' determination that it lacked jurisdiction over the petition for review was a "*de novo*" determination, Pet. App. 6a, rather than a review of the BIA's removal order under the substantial-evidence standard, see 8 U.S.C. 1252(b)(4). Nevertheless, the question whether petitioner is an aggravated felon under 18 U.S.C. 16 bears directly on petitioner's removability as well as the reviewability of his removal order. The Court's prudential policy against granting certiorari to review issues that were not the basis for the decision below therefore is reinforced in this case by principles of deference to agency decision-making. Those deference principles counsel against deciding in the first instance, in this Court, the unexplored issue whether petitioner's Florida conviction is a crime of violence under Section 16(b)—which presumably would determine petitioner's removability if the conviction were not a crime of violence under Section 16(a). See generally *INS* v. *Ventura*, 537 U.S. 12, 16-18 (2002) (discussing rule against judicial decision, on review of a removal order, of issues that have not been considered by the BIA in the first instance).

The legal issues that petitioner raises would be better addressed by this Court, if at all, in a future case

that would allow the Court to interpret and apply *both* 18 U.S.C. 16(a) *and* 18 U.S.C. 16(b). The unpublished decision in this case does not present an opportunity for the Court to consider all of the various approaches that have been adopted by the courts of appeals in the cases discussed above.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
PETER D. KEISLER
Assistant Attorney General
DONALD E. KEENER
GREG D. MACK
Attorneys

JANUARY 2004

(5)

FILED
MAY 10 2004
OFFICE OF THE CLERK

No. 03-583

IN THE

Supreme Court of the United States

JOSUE LEOCAL,

Petitioner,

v.

UNITED STATES ATTORNEY GENERAL, IMMIGRATION AND NATURALIZATION SERVICE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED SEPTEMBER 29, 2003
CERTIORARI GRANTED FEBRUARY 23, 2004

JOINT APPENDIX

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3.	Order of the Immigration Judge	11/15/01	JA100
4.	Order of the Board of Immigration Appeals Affirming Without Opinion the Decision Below	4/24/02	JA104
5.	Decision of the Board of Immigration Appeals Dismissing Appeal of Immigration Judge's Decision and Ordering Removal	8/29/02	JA105
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7.	Order of the U.S. Court of Appeals for the Eleventh Circuit Carrying U.S. Attorney General's Motion to Dismiss for Lack of Jurisdiction with the Case	11/29/02	JA113
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RELEVANT DOCKET ENTRIES

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1.	Immigration Judge's Oral Decision	10/16/01
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4.	Respondent's Letter of Inquiry to the Board of Immigration Appeals and Request for Extension of Time	2/1/02
5.	Immigration and Naturalization Service's Memorandum of Law adopting in Part the Immigration Judge's Decision in Lieu of Brief	2/21/02
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11.	Immigration and Naturalization Service's Decision to Continue Detention Following File Review	7/22/02
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	Entry	Date
28.	Respondent's Brief in Opposition to Petition for Writ of Certiorari	1/18/04

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL COURT IN AND FOR DADE COUNTY, FLORIDA		119
CRIMINAL DIVISION	UNIFORM COMMITMENT TO CUSTODY OF DEPARTMENT OF CORRECTIONS SPRING TERM, 1999	CASE NUMBER 00-697
THE STATE OF FLORIDA VS. JOSUE LEOCAL PLAINTIFF DEFENDANT		CLOCK IN [Stamped: FILED NOV 06 2000 CLERK]

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA, TO THE SHERIFF OF SAID COUNTY AND THE DEPARTMENT OF CORRECTIONS OF SAID STATE, GREETING:

The above named defendant having been duly charged with the offense specified herein in the above styled court, and the defendant having been duly convicted and adjudged guilty of and sentenced for said offense by said Court, as appears form the attached certified copies of indictment/information, Judgment and Sentence which are hereby made parts hereof:

Now therefore, this is to command you, the said sheriff, to take and keep and , within a reasonable time after receiving this commitment, safely deliver the defendant, together with any pertinent Investigation Report prepared in this case, into the custody of the Department of Corrections of the State of Florida to Reception Center designated by the Department of

Corrections; and this is to command you, the Department of Corrections and other officials. to keep and safely imprison the defendant for the term of said sentence in the institution in the state correctional system to which you may cause the defendant to be conveyed or thereafter transferred. And these presents shall be your authority for the same. Herein fail not.

[Stamped:CIRCUIT AND COUNTY COURTS, Dade County Florida]
WITNESS the Honorable STANFORD BLAKE
Judge of said Court, and also, Clerk and Seal thereof, this 30TH day of OCTOBER, 2000. HARVEY RUIN, Clerk
By FRANKIE HAMILTON 5389, [Signed: Frankie Hamilton]
Deputy Clerk
CLK/CT 403 6/94

[Stamped/Handwritten: EXHIBIT 2
Marked for Identification ☒
Admitted ☒ 2/22/01

☒ IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL COURT IN AND FOR DADE COUNTY, FLORIDA ☐ IN THE COUNTY COURT IN AND FOR DADE COUNTY, FLORIDA	153

DIVISION	JUDGMENT	
☒ CRIMINAL ☐ OTHER	☐ Probation Violator ☐ Community Control Violator ☐ Retrial ☐ Resentenct	CASE NUMBER 00-697

THE STATE OF FLORIDA VS. JOSUE LEOCAL PLAINTIFF DEFENDANT	CLOCK IN [Stamped: FILED NOV 06 2000 CLERK]

The Defendant, JOSUE LEOCAL , being personally before this Court represented by L. MARTIN, his attorney of record, and the State represented by J. DIMITRIS, Assistant State 's Attorney, and having:
☐ been tried and found guilty
☒ entered a plea of guilty
☐ entered a plea of nolo contendere
to the following crime(s):

COUNT	CRIME	OFFENSE STATUTE NO.	DEGREE OF CRIME	OBTS NO.
1 & 2	DRIVING UNDER THE INFLUENCE	316.193(3)(C)2	3F	

	CAUSING SERIOUS BODILY INJURY			

and no cause being shown why the Defendant should not be adjudicated guilty. IT IS ORDERED THAT the Defendant is hereby ADJUDICATED GUILTY of the above crime(s).

FH 11/1/00 Page 1 of 3

CLK/CT 401 REV 4/97

☒ IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL COURT IN AND FOR DADE COUNTY, FLORIDA ☐ IN THE COUNTY COURT IN AND FOR DADE COUNTY, FLORIDA	153

DIVISION ☒ CRIMINAL ☐ OTHER	CHARGES/COSTS/FEES	CASE NUMBER 00-697

THE STATE OF FLORIDA VS. JOSUE LEOCAL PLAINTIFF DEFENDANT	CLOCK IN [Stamped: FILED NOV 06 2000 CLERK]

The Defendant is hereby ordered to pay the following sum if checked:

☐ Fifty dollars ($50.00) pursuant to F.S. 938.03 (Crimes Compensation Trust Fund).
☐ Five dollars ($5.00) as a court cost pursuant to F.S. 938.01 (1) $3.00, F.S. 938.15 $2.00 (Criminal Justice Trust & Education Funds).
☐ A fine in the sum of $ _____ pursuant to F.S. 775.0835. (This provision refers to the optional fine for the Crimes Compensation Trust Fund, and is not applicable unless checked and completed. Fines imposed as a part of a sentence to F.S. 775.083 are to be recorded on the Sentence page(s)).
☐ Twenty dollars ($20.00) pursuant to F.S. 938.09 (Handicapped and Elderly Security Assistance Trust Fund).
☐ A sum of $ _____ pursuant to 938.05 (Local Government

Criminal Justice Trust Fund).
☐ Restitution in accordance to the attached order.
☐ Three dollars ($3.00) Juvenile Assessment Center pursuant to Dade County Ordinance 96-182, F.S. Incorporating F.S. 938.17.
☐ A sum of $_____ pursuant to F.S. 27.52 (Public Defender Application Fee).
☐ A sum of $_____ pursuant to F.S. 939.18 (Court Facilities Cost).
☐ A sum of $_____ pursuant to F.S. 938.06 (Crime Stopper's Programs).
☐ A sum of $_____ pursuant to F.S. 938.19 (Teen Courts).
☐ A sum of $_____ pursuant to F.S. 775.083 (Crime Prevention Programs).

Other COURT COSTS PREVIOUSLY IMPOSED ON SEPTEMBER 15, 2000

DONE AND ORDERED in Open Court in Dade County, Florida this 30TH day of OCTOBER, 2000.

[Signed: Stanford Blake]

JUDGE
STANFORD BLAKE

CLK/CT 413 REV 1/00

☒ IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL COURT
IN AND FOR DADE COUNTY, FLORIDA
☐ IN THE COUNTY COURT IN AND FOR DADE COUNTY, FLORIDA

DIVISION ☒ CRIMINAL ☐ OTHER	FINGERPRINTS OF DEFENDANT	CASE NUMBER 00-697
THE STATE OF FLORIDA VS. JOSUE LEOCAL PLAINTIFF DEFENDANT		CLOCK IN [Stamped: FILED NOV 06 2000 CLERK]

FINGERPRINTS AND SOCIAL SECURITY NUMBER OF DEFENDANT

1. R. Thumb	2. R. Index	3. R. Middle	4. R. Ring	5. R. Little
NO PREV	FINGER VIOUSLY	PRINTS TAKEN ON	TAKEN SEPTEM	BER 15, 2000
1. L. Thumb	2. L. Index	3. L. Middle	4. L. Ring	5. L. Little

Fingerprints taken by: _____
Name Title
Defendant's social Security number is _____

I HEREBY CERTIFY that the above and foregoing are the fingerprints of the Defendant, _____ and that they

were placed thereon by said Defendant in my presence in Open Court this date, and that the defendant either

☐ provided the above-mentioned social security number.

OR

☐ was unable or unwilling to provide his/her social security number.

DONE AND ORDERED in Open Court in Dade County, Florida this 30TH day of OCTOBER, 2000.

[Signed: Stanford Blake]

JUDGE
STANFORD BLAKE

CLK/CT 854 1/00

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL COURT IN AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION	SENTENCE (AS TO COUNT 1)	CASE NUMBER 00-697 OBTS NUMBER _____
THE STATE OF FLORIDA VS. JOSUE LEOCAL PLAINTIFF DEFENDANT		CLOCK IN [Stamped: FILED NOV 06 2000 CLERK]

The defendant, being personally before this Court, accompanied by his attorney, L. MARTIN, and having been adjudicated guilty herein, and the Court having given the defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why he should not be sentenced as provided by law, and no cause being shown and the Court having:

☐ on _____ deferred imposition of sentence until this date.

(Check one)

☐ previously entered a judgment in this case on the defendant now resentences the defendant.

☐ placed the defendant on Probation/Community Control and having subsequently revoked the defendant's probation/Community Control.

IT IS THE SENTENCE OF THE COURT that the defendant:

☐ pay a fine of $_____, pursuant to F.S. 775.083, plus

$_____ as the 5% surcharge required by F.S. 938.04.

☒ is hereby committed to the custody of the Department of Corrections.

☐ is hereby committed to the custody of the Sheriff of Dade County, Florida.

☐ is sentenced as a youth offender in accordance with F.S. 958.04.

TO BE IMPRISONED (check one; unmarked sections are inapplicable)

☐ for a term of Natural Life.

☐ for a term of TWO POINT FIVE (2.5) YEARS.

☐ said SENTENCE IS SUSPENDED for a period of _____ subject to conditions set forth in this Order.

☐ IT IS FURTHER ORDERED that the entry of sentence be suspended as to count(s) _____of this case.

AS TO COUNT 2, THE DEFENDANT IS PLACED ON PROBATION IN A SEPARATE ORDER HEREIN.

Defendant JOSUE LEOCAL
Case Number 00-697

If "split" sentence complete either of paragraphs

X Followed by a period of TWO AND ONE HALF (2 1/2) YEARS on Probation under the supervision of the Department of Corrections according to the terms and conditions of supervision set forth in a separate order entered herein.

_ however, after serving a period of ____ imprisonment in _____, the balance of such sentence shall be suspended and the Defendant shall be placed on Probation/Community Control for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of Probation/Community Control set forth in a separate order entered herein.

In the event the defendant is ordered to serve additional split sentences, all incarceration portions shall be satisfied before the defendant begins service of the supervision terms

SPECIAL PROVISIONS
(As to Count _____)

By appropriate notation, the following provisions apply to the sentence imposed:
MANDATORY/MINIMUM PROVISIONS:

FIREARM:	SEMI-AUTOMATIC FIREARM OR MACHINE GUN:
__Possession	__Possession

__Discharged
__Discharged causing great bodily harm

__Discharged
__Discharged causing great bodily harm

It is further ordered that the _____ mandatory minimum imprisonment provisions of Florida Statute 775.087(2) are hereby imposed for the sentence specified in this count.

DRUG TRAFFICKING: _____ It is further ordered that the ____ mandatory minimum imprisonment provisions of Florida Statute 893.135(1) are hereby imposed for the sentence specifice in this count.

CONTROLLED SUBSTANCE WITHIN 1000 FEET OF SCHOOL: _____ It is further ordered that the three year minimum imprisonment provisions of Florida Statute 893.13(1)(e)1, are hereby imposed for the sentence specified in this court.

FELONY OFFENDER: _____ The defendant is adjudicated a
____ habitual violent felony offender
____ violent career criminal
and has been sentenced to an extended term in accordance with the provisions of Florida Statute 775.084(4). A minimum term of ____ year(s) must be served prior to release. The requisite findings by the court are set forth in a separate order or stated on the record in open

court.]

REPEAT SEXUAL OFFENDER: _____ It is further ordered defendant shall serve a minimum of ____ years before release in accordance with Florida Statute 775.0823.

LAW ENFORCEMENT PROTECTION ACT: _____ AGGRAVATED ASSAULT UPON LAW ENFORCEMENT OFFICER.
_____ AGGRAVATED BATTERY UPON LAW ENFORCEMENT OFFICER
____ 3 years provision of Florida Statute 784.07(2)(c)
____ 5 years provision of Florida Statute 784.07(2)(d)

AGGRAVATED ASSAULT or BATTERY UPON PERSON OVER 65 YEARS OF AGE: _____ It is further ordered that the defendant shall serve a minimum of three years or imprisonment before release, pay a fine of $_____, complete _____ hours of community service and make restitution to the victim in accordance with Florida Statute 784.08.

CAPITAL OFFENSE: _____ it is further ordered that the Defendant shall serve no less than 25 years in accordance with Florida Statute 775.082(1).

PRISON RELEASE REOFFENDER:	____	The defendant is adjudicated a Prison Release Reoffender and has been sentenced to a maximum term in accordance with the provision of Florida Statute 775.0828(8). It is further ordered that the Defendant shall not be released until the expiration of the sentence.

CLK/CT 405 REV. 9/99

Defendant JOSUE LEOCAL
Case Number 00-697

OTHER PROVISIONS

RETENTION OF JURISDICTION	____	The Court retains jurisdiction over the defendant pursuant to Florida Statutes 947.16(3).
JAIL CREDIT	__X__	It is further ordered that the Defendant shall be allowed a total of 253 days as credit for time incarcerated prior to imposition of this sentence.
PRISON CREDIT	____	It is further ordered that the Defendant be allowed credit for all time previously served on this count in the Department of Corrections prior to resentencing.
CONSECUTIVE/ CONCURRENT AS TO OTHER COUNTS	____	It is further ordered that the sentence imposed for count(s) _____ shall run (check one) ☐ consecutive to ☐ concurrent with the sentence set forth in count(s) _____ of this case.
CONSECUTIVE/ CONCURRENT AS TO OTHER CONVICTIONS	____	It is further ordered that the sentence imposed for count(s) _____ shall run (check one) ☐ consecutive to ☐ concurrent with the following: _____ Any active sentence

being served.

_____ Specific sentences:

_____

_____

BLOOD SAMPLE REQUIRED

_____ It is further ordered, pursuant to section 943.325, Florida Statutes, that the defendant, having been convicted of an attempt or offense under section 794 (sexual battery), 800 (lewdness or indecent exposure), 782.04 (murder), 784.045 (aggravated battery), 812.133 (car jacking), or 812.135 (home invasion robbery) shall be required to submit blood specimens.

In the event the above sentence is to the Department of Corrections, the Sheriff of Dade County, Florida, is hereby ordered and directed to deliver the defendant to the Department of Corrections at the facility designated by the Department together with a copy of this Judgment and Sentence and any other documents specified by Florida Statutes

The defendant in Open Court was advised of his right to appeal from this sentence by filing notice of appeal within 30 days from this date with the Clerk of this Court, and the defendant's right to the assistance of counsel in taking said appeal at the expense of the State upon showing of indigence.

in imposing the above sentence, the Court further recommends SOUTH FLORIDA FACILITY.

DONE AND ORDERED in Open Court at Dade County, Florida, this 30TH day of OCTOBER, 2000.

[Signed: Stanford Blake]

_____

Judge
Stanford Blake

CLK/CT 405 REV 3/98

[STAMPED: I HEREBY CERTIFY that the foregoing is a true and correct copy of the original document.
[Signed: Illegible]

(Signature of Immigration Officer)
UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
Miami District
11-21-00 Total of 3 pages
(Date)

☒ IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL COURT IN AND FOR DADE COUNTY, FLORIDA ☐ IN THE COUNTY COURT IN AND FOR DADE COUNTY, FLORIDA		
DIVISION ☒ CRIMINAL ☐ OTHER	JUDGMENT ☐ Withholding & Finding of Guilt ☒ Judgment ☒ Sentence ☐ Plea ☐ Probation ☐ Court Cost	CASE NUMBER 00-697
THE STATE OF FLORIDA VS. JOSUE LEOCAL PLAINTIFF DEFENDANT		CLOCK IN [Stamped: FILED NOV 06 2000 CLERK]

THIS CAUSE HAVING COME BEFORE THE COURT to be heard pursuant to ORDER OF THE COURT and the Court being fully advised in the premise, it is thereupon
ORDERED AND ADJUDGED that the
☐ Withholding & Finding of Guilt
☒ Judgment
☒ Sentence
☐ Plea
☐ Probation
☐ Court Cost Previously entered on SEPTEMBER 15, 2000

☐ **REINSTATED**

and vacated on _____ be and the same is hereby reinstated.

☒ **VACATED**

be and hereby is vacated, set aside and held for naught.
FURTHER, THE COURT RESENTENCES THE DEFENDANT IN A SEPARATE ORDER HEREIN.

DONE AND ORDERED in Open Court at Dade County, Florida, this 30TH day of OCTOBER, 2000.

[Signed: Stanford Blake]

_____
Judge
Stanford Blake

FH 11/1/00

CLK/CT 127 REV 2/98

[STAMPED: I HEREBY CERTIFY that the foregoing is a true and correct copy of the original document.
[Signed: Illegible]

_____
(Signature of Immigration Officer)
UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
Miami District
11-21-00 Total of 1 pages
(Date)

COMPLAINT/ARREST AFFIDAVIT
00 JAN-7 am 3:31

[Stamped: 00 JAN -7 AM 3:31 HOSPITAL SERVICE UNIT]
[Handwritten: 2 Pgs]

OBTS	☒ **Felony** ☒ **Misdemeanor** ☒ **Traffic** ☐ **Juvenile** ☐ **Warrant**	**Jail No** 1797	**Police Case No** 0180-00	
IDS No	**Agency Code** 11	**Municiple PD Del ID No**	**MDPD Records and ID No**	**Court Case No** F00697
Defendant's Name LEOCAL, JOSUE		**DOB** 12/10/55	**Sex** M	**Race** **B**
Ethnic	**Height** 506	**Weight** 185	**Hair** BLK	**Eyes** BRN
Local Address 1140 NE 161 Ter	N MIA BCH FL 33162	**Phone** 940 7140	**Alias**	
Permanent Address Same as Local			**Address Source** ☒ Drivers License ☐ Verbal ☐ Other ☐ Voter's ID	
Business Address UNK		**Phone** --	**Occupation** Labor	**Place of Birth** Haiti
Driver's License No L240 420	**Soc Sec No** 263 99 2211		**Scars, Tattoos, Unique Physical Feature** None Visible	

55 4500 FL		
Illegible ☐ **Yes** ☐ **No**	**Arrest Date** **mo/day/year** 01 / 07 / 00	**Arrest Time** 200 ☒ **AM** ☐ **PM**
Arrest Location (include name of business 103 ST N MIA AVE (RDWY)		**[ILLEGIBLE ROWS]**
Influence of Drugs ☐Yes ☐ No ☒ Unknown	ALIEN	**Resid Type** ☐ City ☐ Florida ☒ [Illegible] ☐ [Illegible]
Co-Defendants Last First Middle DOB mo/day/yr N/A _____ __/__/__		☐ In Custody ☐ At Large ☐ Felony ☐ Misdemeanor ☐ Juvenile
Drug Activity N N/A P Possess S Sell T Traffic R Smuggle D Dealer E Use K Dispense/Distribute M Manufacture/Produce/Cultivate B Buy Z Other		**Drug Type** N N/A A Amphetamine B Barbituate C Cocaine E Heroin H Hallucinogen M Marijuana O Opium Derv P Paraphenalia/Equipment U Unknown Z Other

Charges	Counts	Statute	[Illegible]	Violation Of Section
1. DUI	1	316.193	8649-KFQ	15-1
2. Battery on LEO	1	784.073		
3. Resisting w/Violence	1	843.01		
4. Open Container-Alcohol - in Motor Vehicle	1	30-210-1		
				Of the Code MIASHC

The undersigned certifies and swears that he has just and reasonable grounds to believe, and does believe that the above named Defendant
On the 07 day of Jan, 2000 at 125 A.M.]
(Time)

103 ST N MIA AVE (RDW)

committed the following violation of law. Narrative: (Be specific)

[HANDWRITTEN. D WAS DRIVING AN '85 PLYMOUTH 4 DR, BEARING FL TAG IBO 13J, N/B ON N. MIA AVE. D RAN THE FLASHING RED LIGHT (8648 KFQ) AT THE INTERSECTION OF 103 ST AND N. MIA AVE STRICKING VICTIM WESTON'S VEHICLE. VICTIM WESTON WAS TRAVELING W/B ON 103 ST. VICTIM WESTON WAS PINNED BEHIND THE STEERING WHEEL OF HIS VEHICLE AND HAD TO BE EXTRACTED BY MIA-DADE FIRE RESCUE. MDFR #30,

Page 1 of 3]

Hold for Other Agency
Agency _____ Verified by_____

☐ HOLD FOR BOND HEARING DO NOT BOND OUT (Officer Must Appear at Bond Hearing)

☐ I understand that should I willfully fail to appear before the court as a required by this notice to appear that I may be held in contempt of court and a warrant for my arrest shall be issued. Furthermore, I agree that notice concern the time date and place of all court meanings should be sent to the above address as notify Family Division Juvenile Section; anytime that my address changes.

☐ You need not appear in court but must comply with the instructions on the reverse side herein.

_____
Signature

I swear that the above Statement is correct and true to the best of my knowledge and belief.

Ofc. Westbrook_____

Officer's Name (Print)

[Signature: Ofc. Westbrook]
Officer's Signature

MIA Shores
Department Name

0113 (11)
Court ID Number/Loc Code

Sworn to and subscribed before me the undersigned authority, this 07 day of Jan 2000

[Signature: Illegible 3979]
Deputy of the Court or Notary Public

[STAMPED: I HEREBY CERTIFY that the foregoing is a true and correct copy of the original document.]
[Signed: Illegible]

(Signature of Immigration Officer)
UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
Miami District
11-21-00 Total of 1 pages
(Date)

COMPLAINT/ARREST AFFIDAVIT
CONTINUATION

[Handwritten

OBTS	**☒ Felony** **☒ Misdemeanor** **☒ Traffic** **☐Juvenile** **☐Warrant**	**Jail No** 1797	**Police Case No** 0180-00

IDS No	**Agency Code** 11	**Municiple PD Del ID No**	**MDPD Records and ID No**	**Court Case No** F00697
Defendant's Name LEOCAL, JOSUE		**DOB** 12/10/55		

Additional Charges	**Counts**	**Activity Type**	**Statute**	**[Illegible]**	**Violation Of Section**
DUI - Crash	1	N N	316.193	8650-KFQ	
DUI - Serious Bodily Inj.	1	N N	316.193	1001-KFR	15-1
					Of the Code MIASHC

[HANDWRITTEN: LT. DOUNN, PERFORMED THE EXTRACTION, AND TRANSPORTED VICTIM WESTON TO JMH-TRAUMA CENTER, FOR TREATMENT. WITNESS CAPO WAS TREATED ON

SCENE FOR MINOR LACERATIONS. MDFR #30 ALARM NUMBER 0003017. R/O OBSERVED HIM SITTING ON HIS VEHICLE AND HE APPEARED VERY CONFUSED. HE DID NOT REALIZE THAT HE WAS JUST INVOLVED IN A SERIOUS ACCIDENT. HE HAD A STRONG ODOR OF ALCOHOLIC BEVERAGE ON HIS BREATH AND BLOODSHOT/WATERY EYES. HE STATED HE WAS TIRED AND WANTED TO GO TO SLEEP. OFC. GIACOMONE OBSERVED A HALF EMPTY MINATURE BOTTLE OF JACK DANIEL'S WHISKEY LAYING ON THE DRIVERS' FLOOR BOARD OF HIS VEHICLE. AT THIS TIME HE VOLUNTARILY STATED TO SGT. MCLEOD, "I CAN NO LIE SARGE, I HAVE BEEN DRINKING TONIGHT." OFC. GIACOMONE ATTEMPTED TO OFFER FIELD SOBRIETY TESTS TO HIM, AT WHICH TIME HE SHOVED OFC. GIACOMONE IN THE CHEST. HE WAIVED HIS ARMS IN SUCH A MANNER AS TO PREVENT FROM BEING PLACED UNDER ARREST. HE ATTEMPTED TO PUSH R/O AND OFC. GIACOMONE AWAY FROM HIM, AT WHICH TIME HE WAS FORCIBLY PLACED UNDER ARREST. HE WAS TRANSPORTED TO WARD "D" WHERE]

Page 2 of 3]

Hold for Other Agency
Agency _____ Verified by_____

☐ HOLD FOR BOND HEARING DO NOT BOND OUT
(Officer Must Appear at Bond Hearing)
☐ I understand that should I willfully fail to appear before the court as a required by this notice to appear that I may be held in contempt of court and a warrant for my arrest shall be issued. Furthermore, I agree that notice concern the time date and place of all court meanings should be sent to the

above address as notify Family Division Juvenile Section; anytime that my address changes.

☐ You need not appear in court but must comply with the instructions on the reverse side herein.

_____
Signature

I swear that the above Statement is correct and true to the best of my knowledge and belief.

Ofc. Westbrook_____
Officer's Name (Print)

[Signature: Ofc. Westbrook]
Officer's Signature

MIA Shores
Department Name

0113 (11)_____
Court ID Number/Loc Code

Sworn to and subscribed before me the undersigned authority, this 07 day of Jan 2000

[Signature: Illegible 3979]_____
Deputy of the Court or Notary Public

COMPLAINT/ARREST AFFIDAVIT CONTINUATION

OBTS	☒ Felony ☒ Misdemeanor ☒ Traffic ☐ Juvenile ☐ Warrant	Jail No 1797	Police Case No 0180-00

IDS No	Agency Code 11	Municiple PD Del ID No	MDPD Records and ID No	Court Case No F00697

Defendant's Name LEOCAL, JOSUE	DOB 12/10/55	

[HANDWRITTEN: NURSE PRACTIONER GARY THOMPSON DREW BLOOD FROM HIM. HE THEN WAS TRANSPORTED TO DCJ. * NOTE: WITNESS CAPO WAS THE FRONT, PASSENGER IN VICTIM WESTON'S VEHICLE.]

Page 3 of 3]

Hold for Other Agency
Agency _____ Verified by_____

☐ HOLD FOR BOND HEARING DO NOT BOND OUT
(Officer Must Appear at Bond Hearing)

☐ I understand that should I willfully fail to appear before the court as a required by this notice to appear that I may be

held in contempt of court and a warrant for my arrest shall be issued. Furthermore, I agree that notice concern the time date and place of all court meanings should be sent to the above address as notify Family Division Juvenile Section; anytime that my address changes.

☐ You need not appear in court but must comply with the instructions on the reverse side herein.

_____
Signature

I swear that the above Statement is correct and true to the best of my knowledge and belief.

Ofc. Westbrook
Officer's Name (Print)

[Signature: Ofc. Westbrook]
Officer's Signature

MIA Shores
Department Name

0113 (11)
Court ID Number/Loc Code

Sworn to and subscribed before me the undersigned authority, this 07 day of Jan 2000

[Signature: Illegible 3979]
Deputy of the Court or Notary Public

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DATE COUNTY, FLORIDA FALL TERM, 1999

[Stamped: FILED
JAN 28 2000 CLERK]

THE STATE OF FLORIDA v.

JOSUE LEOCAL,

Defendant. **INFORMATION FOR**

1. DRIVING UNDER THE INFLUENCE CAUSING SERIQUS BODILY INJURY
316.193(3) (c) 2 FEL. 3D
2. DRIVING UNDER THE INFLUENCE CAUSING SERIOUS BODILY INJURY
316.193(3) (c) 2 FEL. 3D
3. BATTERY OF A LAW ENFORCEMENT OFFICER
784.07 & 784.03 FEL. 3D
4. RESISTING AN OFFICER WITH VIOLENCE
843.01 FEL. 3D

IN THE NAME AND BY AUTHORITY OF THE STATE OF FLORIDA:

SETH LAVEY, Assistant State Attorney of the Eleventh Judicial Circuit, on the authority of **KATHERINE FERNANDEZ RUNDLE**, State Attorney, prosecuting for the State of Florida, in the County of Miami-Dade, under

oath, information makes that: JOSUE LEOCAL, on or about JANUARY 7, 2000, in the County and State aforesaid, did unlawfully drive or be in actual physical control of a motor vehicle in Miami-Dade County while under the influence of alcoholic beverages, any chemical substance set forth in s. 877.111, Fla. Stat., or any substance controlled under s. 893, Fla. Stat., when affected to the extent that said defendant's normal faculties were impaired and/or while having a blood or breath alcohol level of 0,08 percent or higher and by reason of operation of said motor vehicle did cause serious bodily injury to another, to wit: SUEN CAPO, being in violation of s. 316(3) (c)2, Fla. Stat., contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

f:CPCCases/00697.doc (jar) 01/27/00
CIRCUIT COURT DIRECT FILE
Jail # 00-1797; Bkd. 01/07/00; CIN 0470441; B/M,
DOB: 12/10/55, SS# 263-99-2211
F00-697
J/Blake (012)

COUNT 2

And the aforesaid Assistant State Attorney, under oath, further information makes that JOSUE LEOCAL, on or about JANUARY 7, 2000, in the County and State aforesaid, did unlawfully drive or be in actual physical control of a motor vehicle in Miami-Dade County while under the influence of alcoholic beverages, any chemical substance set forth in s. 877.111, Fla. Stat., or any substance controlled under s. 893, Fla. Stat., when affected to the extent that said defendant's normal faculties were impaired and/or while having a blood or breath alcohol level of 0.08 percent or higher and by reason of operation of said motor vehicle did cause serious bodily injury to another, to wit: THOMAS WESTON, being in violation of s. 316(3) (c)2, Fla. Stat., contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

COUNT 3

And the aforesaid Assistant State Attorney, under oath, further information makes that JOSUE LEOCAL, on or about JANUARY 7, 2000, in the County and State aforesaid, did unlawfully, feloniously and knowingly commit a battery upon OFFICER SERGIO CIACOMONE, a duly qualified law enforcement officer, while said person was then and there engaged in the lawful performance of duties, by actually and intentionally touching or striking said person against said person's will, in violation of s. 784.07 and s. 784.03, Fla. Stat., contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

COUNT 4

And the aforesaid Assistant State Attorney, under oath, makes that JOSUE LEOCAL, on or about JANUARY 7, 2000, in the County and State aforesaid, did unlawfully, knowingly, willfully and feloniously resist, obstruct or oppose OFFICERS SERGIO CIACOMONE and/or MATTHEW WESTBROOK, duly qualified law enforcement officers, in the lawful execution of a legal duty being performed by said officers, to wit: The detention and/or arrest of said defendant, and/or the investigation of said defendant for Driving Under the Influence, by the said defendant offering or doing violence to the persons of said officers, in violation of s. 843.01 Fla. Stat., contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

STATE OF FLORIDA, COUNTY OF MIAMI-DADE:

Personally known to me and appeared before me, the Assistant State Attorney of the Eleventh Judicial Circuit of Florida whose signature appears below, being first duly sworn, says that the allegations set forth in this Information are based upon facts which have been sworn to as true, by a material witness or witnesses, and which if true, would constitute the offenses therein charged, and that this prosecution is instituted in good faith.

[Handwritten - Signature Illegible]
Assistant State Attorney
Florida Bar # 129739
1350 NW 12th Avenue, Miami, FL (305) 547-0100

Sworn to and subscribed before me this 28th day of Jan, 2000

By [Handwritten - Illegible]
Deputy Clerk for the Clerk of the Courts
Notary Public
[Handwritten - Number Illegible]

[Stamped - Seal Affixed:
CIRCUIT AND COUNTY COURTS,
Dade County Florida]

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL COURT IN AND FOR DADE COUNTY, FLORIDA		119
CRIMINAL DIVISION	UNIFORM COMMITMENT TO CUSTODY OF DEPARTMENT OF CORRECTIONS SPRING TERM, 1999	CASE NUMBER 00-697
THE STATE OF FLORIDA VS. JOSUE LEOCAL PLAINTIFF DEFENDANT		CLOCK IN [Stamped: FILED NOV 06 2000 CLERK]

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA, TO THE SHERIFF OF SAID COUNTY AND THE DEPARTMENT OF CORRECTIONS OF SAID STATE, GREETING:

The above named defendant having been duly charged with the offense specified herein in the above styled court, and the defendant having been duly convicted and adjudged guilty of and sentenced for said offense by said Court, as appears form the attached certified copies of indictment/information, Judgment and Sentence which are hereby made parts hereof:

Now therefore, this is to command you, the said sheriff, to take and keep and, within a reasonable time after receiving this commitment, safely deliver the defendant, together with any pertinent Investigation Report prepared in this case, into the custody of the Department of Corrections of the State of Florida to Reception Center designated by the Department of Corrections; and this is to command you, the Department of

Corrections and other officials. to keep and safely imprison the defendant for the term of said sentence in the institution in the state correctional system to which you may cause the defendant to be conveyed or thereafter transferred. And these presents shall be your authority for the same. Herein fail not.

[Stamped:CIRCUIT AND COUNTY COURTS, Dade County Florida]

WITNESS the Honorable STANFORD BLAKE
Judge of said Court, and also, Clerk and Seal thereof, this 30TH day of OCTOBER, 2000.
HARVEY RUVIN, Clerk
By FRANKIE HAMILTON 5389, [Signed: Frankie Hamilton] Deputy Clerk

CLK/CT 403 6/94

[STAMPED: I HEREBY CERTIFY that the foregoing is a true and correct copy of the original document.
[Signed: Illegible]

(Signature of Immigration Officer)
UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
Miami District
11-21-00 Total of 1 pages
(Date)

☒ IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL COURT IN AND FOR DADE COUNTY, FLORIDA ☐ IN THE COUNTY COURT IN AND FOR DADE COUNTY, FLORIDA		153
DIVISION ☒ CRIMINAL ☐ OTHER	JUDGMENT ☐ Probation Violator ☐ Community Control Violator ☐ Retrial ☐ Resentence	CASE NUMBER 00-697
THE STATE OF FLORIDA VS. JOSUE LEOCAL PLAINTIFF DEFENDANT		CLOCK IN [Stamped: FILED NOV 06 2000 CLERK]

The Defendant. JOSUE LEOCAL , being personally before this Court represented by L. MARTIN, his attorney of record, and the State represented by J. DIMITRIS, Assistant State 's Attorney, and having:
☐ been tried and found guilty
☒ entered a plea of guilty
☐ entered a plea of nolo contendere
to the following crime(s):

COUNT	CRIME	OFFENSE STATUTE NO.	DEGREE OF CRIME	OBTS NO.
1 & 2	DRIVING UNDER THE INFLUENCE	316.193(3)(c)2	3F	

	CAUSING SERIOUS BODILY INJURY			

and no cause being shown why the Defendant should not be adjudicated guilty. IT IS ORDERED THAT the Defendant is hereby ADJUDICATED GUILTY of the above crime(s).

FH 11/1/00 Page 1 of 3

CLK/CT 401 REV 4/97

☒ IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL COURT IN AND FOR DADE COUNTY, FLORIDA ☐ IN THE COUNTY COURT IN AND FOR DADE COUNTY, FLORIDA		
DIVISION ☒ CRIMINAL ☐ OTHER	CHARGES/COSTS/FEES	CASE NUMBER 00-697
THE STATE OF FLORIDA VS. JOSUE LEOCAL PLAINTIFF DEFENDANT		CLOCK IN [Stamped: FILED NOV 06 2000 CLERK]

The Defendant is hereby ordered to pay the following sum if checked:

- ☐ Fifty dollars ($50.00) pursuant to F.S. 938.03 (Crimes Compensation Trust Fund).
- ☐ Five dollars ($5.00) as a court cost pursuant to F.S. 938.01 (1) $3.00, F.S. 938.15 $2.00 (Criminal Justice Trust & Education Funds).
- ☐ A fine in the sum of $ _____ pursuant to F.S. 775.0835. (This provision refers to the optional fine for the Crimes Compensation Trust Fund, and is not applicable unless checked and completed. Fines imposed as a part of a sentence to F.S. 775.083 are to be recorded on the Sentence page(s)).
- ☐ Twenty dollars ($20.00) pursuant to F.S. 938.09 (Handicapped and Elderly Security Assistance Trust Fund).
- ☐ A sum of $ _____ pursuant to 938.05 (Local Government Criminal Justice Trust Fund).

- ☐ Restitution in accordance to the attached order.
- ☐ Three dollars ($3.00) Juvenile Assessment Center pursuant to Dade County Ordinance 96-182, F.S. Incorporating F.S. 938.17.
- ☐ A sum of $_____ pursuant to F.S. 27.52 (Public Defender Application Fee).
- ☐ A sum of $_____ pursuant to F.S. 939.18 (Court Facilities Cost).
- ☐ A sum of $_____ pursuant to F.S. 938.06 (Crime Stopper's Programs).
- ☐ A sum of $_____ pursuant to F.S. 938.19 (Teen Courts).
- ☐ A sum of $_____ pursuant to F.S. 775.083 (Crime Prevention Programs).

Other COURT COSTS PREVIOUSLY IMPOSED ON SEPTEMBER 15, 2000

DONE AND ORDERED in Open Court in Dade County, Florida this 30TH day of OCTOBER, 2000.

[Signed: Stanford Blake]

JUDGE
STANFORD BLAKE

CLK/CT 413 REV 1/00

[STAMPED: I HEREBY CERTIFY that the foregoing is a true and correct copy of the original document.
[Signed: Illegible]

(Signature of Immigration Officer)
UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
Miami District
11-21-00 Total of 3 pages
(Date)

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL COURT IN AND FOR DADE COUNTY, FLORIDA		
CRIMINAL DIVISION	SENTENCE (AS TO COUNT 1)	CASE NUMBER 00-697 OBTS NUMBER
THE STATE OF FLORIDA VS. JOSUE LEOCAL PLAINTIFF DEFENDANT		CLOCK IN [Stamped: FILED NOV 06 2000 CLERK]

The defendant, being personally before this Court, accompanied by his attorney, L. MARTIN, and having been adjudicated guilty herein, and the Court having given the defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why he should not be sentenced as provided by law, and no cause being shown and the Court having:

☐ on _____ deferred imposition of sentence until this date.

(Check one)

☐ previously entered a judgment in this case on the defendant now resentences the defendant.

☐ placed the defendant on Probation/Community Control and having subsequently revoked the defendant's probation/Community Control.

IT IS THE SENTENCE OF THE COURT that the defendant:

☐ pay a fine of $_____, pursuant to F.S. 775.083, plus

$_____ as the 5% surcharge required by F.S. 938.04.

☒ is hereby committed to the custody of the Department of Corrections.

☐ is hereby committed to the custody of the Sheriff of Dade County, Florida.

☐ is sentenced as a youth offender in accordance with F.S. 958.04.

TO BE IMPRISONED (check one; unmarked sections are inapplicable)

☐ for a term of Natural Life.

☒ for a term of TWO POINT FIVE (2.5) YEARS.

☐ said SENTENCE IS SUSPENDED for a period of _____ subject to conditions set forth in this Order.

☐ IT IS FURTHER ORDERED that the entry of sentence be suspended as to count(s) _____of this case.

AS TO COUNT 2, THE DEFENDANT IS PLACED ON PROBATION IN A SEPARATE ORDER HEREIN.

Defendant LEOCAL
Case Number 00-697

If "split"sentence _x_ complete either of paragraphs

Followed by a period of TWO AND ONE HALF ($2_{1/2}$ YEARS on Probation XXXXXXXXXXXX under the supervision of the Department of Corrections according to the terms and conditions of supervision set forth in a separate order entered herein.

___ However, after serving a period of _____ imprisonment in ____, the balance of such sentence shall be suspended and the Defendant shall be placed on Probation/Community Control for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of Probation/Community Control set forth in a separate order entered herein.

In the event the defendant is ordered to serve additional split sentences, all incarceration portions shall be satisfied before the defendant begins service of the supervision terms.

SPECIAL PROVISIONS
(As to Count _____)

By appropriate notation, the following provisions apply to the sentence imposed:

MANDATORY/MINIMUM PROVISIONS:

FIREARM:

____ Possession
____ Discharged
____ Discharged causing great bodily harm

SEMI-AUTOMATIC FIREARM OR MACHINE GUN:

____ Possession
____ Discharged
____ Discharged causing great bodily harm

It is further ordered that the _____ mandatory minimum imprisonment provisions of Florida Statute 775.087(2) are hereby imposed for the sentence specified in this count.

Drug Trafficking _____ It is further ordered that the ___ mandatory minimum imprisonment provision of Florida Statute 893.135(1) are hereby imposed for the sentence specified in this count.

CONTROLLED SUBSTANCE WITHIN 1000 FEET OF SCHOOL: _____ It is further ordered that the three year minimum imprisonment provisions of Florida Statute 893.13(1)(e)1, are hereby imposed for the sentence specified in this court.

FELONY OFFENDER: _____ The defendant is adjudicated a
__ habitual violent felony offender
__ violent career criminal
and has been sentenced to an extended term in accordance with the provision of Florida Statute 775.084(4). A minimum term of ___ year(s) must be served prior to release.

The requisite findings by the court are set forth in a separate order or stated on the record in open court.

REPEAT SEXUAL OFFENDER: _____ It is further ordered that the defendant shall serve a minimum of _____ years before release in accordance with Florida Statute 775.0823.

LAW ENFORCEMENT PROTECTION ACT:

____ AGGRAVATED ASSAULT UPON LAW ENFORCEMENT OFFICER

_____ AGGRAVATED BATTERY UPON LAW ENFORCEMENT OFFICER

It is further ordered that the defendant shall serve a minimum of:
___ 3 years provision of Florida Statute 784.07(2)(c)
___ 5 years provision of Florida Statute 784.07(2)(d)

AGGRAVATED ASSAULT or BATTERY UPON PERSON OVER 65 YEARS OF AGE: _____ It is further ordered that the defendant shall serve a minimum of three years or imprisonment before release, pay a fine of $_____, complete ____ hours of community service and make restitution to the victim in accordance with Florida Statute 784.08.

CAPITAL OFFENSE:	____	It is further ordered that the Defendant shall serve no less than 25 years in accordance with Florida Statute 775.082(1).
PRISON RELEASE REOFFENDER:	____	The defendant is adjudicated a Prison Release Reoffender and has been sentenced to a maximum term in accordance with the provision of Florida Statute 775.082(8). It is further ordered that the Defendant shall not be released until the expiration of the sentence.

(2) PAGE 2 of 3

Defendant JOS AL [HOLE PUNCHED]

Case Number 00-697

OTHER PROVISIONS

RETENTION OF JURISDICTION	____	The Court retains jurisdiction over the defendant pursuant to Florida Statutes 947.16(3).
JAIL CREDIT	__x__	It is further ordered that the Defendant shall be allowed a total of 253 days as credit for time incarcerated prior to imposition of this sentence.
PRISON CREDIT	_____	It is further ordered that the Defendant be allowed credit for all time previously served on this count in the Department of Corrections prior to resentencing.
CONSECUTIVE/ CONCURRENT AS TO OTHER COUNTS	____	It is further ordered that the sentence imposed for count(s) ____ shall run ___ consecutive to ___ concurrent with the sentence set forth in count(s) _____ of this case.

CONSECUTIVE/ CONCURRENT AS TO OTHER CONVICTIONS

____ It is further ordered that the composite term of all sentences imposed for the counts specified in this order shall run

____ consecutive to

____ concurrent with the following:

_____ Any active sentence being served.

_____ Specific sentences:

_____

_____

_____

BLOOD SAMPLE REQUIRED

____ It is ordered, pursuant to section 943.325, Florida Statutes, that the defendant, having been convicted of an attempt or offense under section 794 (sexual battery), 800 (lewdness or indecent exposure), 782.04 (murder), 784.045 (aggravated battery), 812.133 (car jacking), or 812.135 (home invasion robbery) shall be required to submit blood specimens.

In the event the above sentence is to the Department of Corrections, the Sheriff of Dade County, Florida, is hereby ordered and directed to deliver the defendant to the Department of Corrections at the facility designated by the Department together with a copy of this Judgment and Sentence and any other documents specified by Florida Statutes.

The defendant in Open Court was advised of his right to appeal from this sentence by filing notice of appeal within thirty days from this date with the Clerk of this Court, and the defendant's right to the assistance of counsel in taking said appeal at the expense of the State upon showing of indigence.

In imposing the above sentence, the Court further recommends SOUTH FLORIDA FACILITY

_____

_____

_____

_____

DONE AND ORDERED in Open Court at Dade County, Florida, this 30th day of October ,xx2000

_____

JUDGE
STANFORD BLAKE

(3) PAGE 3 of 3

[STAMPED: I HEREBY CERTIFY that the foregoing is a true and correct copy of the original document.
[Signed: Illegible]

(Signature of Immigration Officer)
UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
Miami District
11-21-00 Total of 3 pages
(Date)

☒ IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL COURT IN AND FOR DADE COUNTY, FLORIDA ☐ IN THE COUNTY COURT IN AND FOR DADE COUNTY, FLORIDA		
DIVISION ☒ CRIMINAL ☐ OTHER	ORDER VACATING ☐ Withholding & Finding of Guilt ☒ Judgment ☒ Sentence ☐ Plea ☐ Probation ☐ Court Cost	CASE NUMBER 00-697
THE STATE OF FLORIDA VS. JOSUE LEOCAL PLAINTIFF DEFENDANT		CLOCK IN [Stamped: FILED NOV 06 2000 CLERK]

THIS CAUSE HAVING COME BEFORE THE COURT to be heard pursuant to ORDER OF THE COURT and the Court being fully advised in the premise, it is thereupon
ORDERED AND ADJUDGED that the
☐ Withholding & Finding of Guilt
☒ Judgment
☒ Sentence
☐ Plea
☐ Probation
☐ Court Cost Previously entered on SEPTEMBER 15, 2000

☐ **REINSTATED**

and vacated on _____ be and the same is hereby reinstated.

☒ **VACATED**

be and hereby is vacated, set aside and held for naught.
FURTHER, THE COURT RESENTENCES THE DEFENDANT IN A SEPARATE ORDER HEREIN.

DONE AND ORDERED in Open Court at Dade County, Florida, this 30TH day of OCTOBER, 2000.

[Signed: Stanford Blake]

_____
Judge
Stanford Blake

FH 11/1/00

CLK/CT 127 REV 2/98

[STAMPED: I HEREBY CERTIFY that the foregoing is a true and correct copy of the original document.
[Signed: Illegible]

_____
(Signature of Immigration Officer)
UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
Miami District
11-21-00 Total of 1 pages
(Date)

COMPLAINT/ARREST AFFIDAVIT

[Stamped: 00 JAN -7 AM 3:31 HOSPITAL SERVICE UNIT]

OBTS	☒ **Felony** ☒ **Misdemeanor** ☒ **Traffic** ☐ **Juvenile** ☐ **Warrant**	**Jail No** 1797	**Police Case No** 0180-00

IDS No	**Agency Code** 11	**Municiple PD Del ID No**	**MDPD Records and ID No**	**Court Case No** F00697
Defendant's Name LEOCAL, JOSUE		**DOB** 12/10/55	**Sex** M	**Race** **B**
Ethnic	**Height** 506	**Weight** 185	**Hair** BLK	**Eyes** BRN
Local Address 1140 NE 161 Ter	N MIA BCH FL 33162	**Phone** 940 7140	**ALIAS**	
Permanent Address Same as Local			**Address Source** ☒ Drivers License ☐ Verbal ☐ Voter's ID ☐ Other _____	
Business Address UNK		**Phone** --	**Occupation** Labor	**Place of Birth** Haiti
Driver's License No L240 420	**Soc Sec No** 263 99 2211		**Scars, Tattoos, Unique Physical Features**	

55 4500 FL		None Visible
Illegible ☐ **Yes** ☐ **No**	**Arrest Date** **mo/day/year** 01 / 07 / 00	**Arrest Time** 200 ☒ **AM** ☐ **PM**
Arrest Location (include name of business 103 ST N MIA AVE (RDWY)		**[ILLEGIBLE ROWS]**

Influence of Drugs ☐Yes ☐ No ☒ Unknown	ALIEN	**Resid Type** ☐ City ☐ Florida ☒ [Illegible] ☐ [Illegible]

Co-Defendants Last First Middle DOB mo/day/yr N/A _____ __/__/____	☐ In Custody ☐ At Large ☐ Felony ☐ Misdemeanor ☐ Juvenile
Drug Activity N N/A P Possess S Sell T Traffic R Smuggle D Dealer E Use K Dispense/Distribute M Manufacture/Produce/Cultivate B Buy Z Other	**Drug Type** N N/A A Amphetamine B Barbituate C Cocaine E Heroin H Hallucinogen M Marijuana O Opium Derv P Paraphenalia/Equip ment U Unknown Z Other

Charges	Counts	Statute	[Illegible]	Violation Of Section
1. DUI	1	316.193	8649-KFQ	15-1
2. Battery on LEO	1	784.073		
3. Resisting w/Violence	1	843.01		
4. Open Container-Alcohol - in Motor Vehicle	1	30-210-1		
				Of the Code MIASHC

The undersigned certifies and swears that he has just and reasonable grounds to believe, and does believe that the above named Defendant
On the 07 day of Jan , 2000 At 125 A.M. 103 ST NMIA AVE
(Time)

committed the following violation of Law: Narrative:
(Be Specific)
[HANDWRITTEN: D WAS DRIVING AN '85 PLYMOUTH 4DR , BEARING FL TAB IBO 13J, N/B ON N. MIA AVE. D RAN THE FLASHING RED LIGHT (8648 KFQ) AT THE INTERSECTION OF 103 ST AND N.

MIA AVE STRIKING VICTIM WESTON'S VEHICLE. VICTIM WESTON WAS TRAVELING W/B ON 103 ST. VICTIM WESTON WAS PINNED BEHIND THE STEERING WHEEL OF HIS VEHICLE AND HAD TO BE EXTRACTED BY MIA-DADE FIRE RESCUE. MDFR #30,]

Hold for Other Agency
Agency _____ Verified by_____

☐ HOLD FOR BOND HEARING DO NOT BOND OUT
(Officer Must Appear at Bond Hearing)

☐ I understand that should I willfully fail to appear before the court as a required by this notice to appear that I may be held in contempt of court and a warrant for my arrest shall be issued. Furthermore, I agree that notice concern the time date and place of all court meanings should be sent to the above address as notify Family Division Juvenile Section; anytime that my address changes.

☐ You need not appear in court but must comply with the instructions on the reverse side herein.

_____
Signature

I swear that the above Statement is correct and true to the best of my knowledge and belief.

Ofc. Westbrook_____
Officer's Name (Print)

[Signature: Ofc. Westbrook]

Officer's Signature

MIA Shores
Department Name

0113 (11)
Court ID Number/Loc Code

Sworn to and subscribed before me the undersigned authority, this 07 day of Jan 2000

[Signature: Illegible 3979]
Deputy of the Court or Notary Public

[STAMPED: I HEREBY CERTIFY that the foregoing is a true and correct copy of the original document.
[Signed: Illegible]

(Signature of Immigration Officer)
UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
Miami District
11-21-00 Total of 1 pages
(Date)

COMPLAINT/ARREST AFFIDAVIT
CONTINUATION

OBTS	☒ Felony ☒ Misdemeanor ☒ Traffic ☐ Juvenile ☐ Warrant	Jail No 1797	Police Case No 0180-00

IDS No	Agency Code 11	Municiple PD Del ID No	MDPD Records and ID No	Court Case No F00697

Defendant's Name LEOCAL, JOSUE	DOB 12/10/55

Addi-tional Charges	Activity Type	Counts	Statute	[Illegi-ble]	Violation of Section
DUI - Crash	N N	1	316.193	8650-KFQ	15-1
DUI - Serious Bodily Inj.	N N	1	316.193	1001-KFR	

				Of the Code MIASHOR

[HANDWRITTEN: LT. DOUNN, PERFORMED THE EXTRACTION, AND TRANSPORTED VICTIM WESTON TO JMH-TRAUMA CENTER, FOR

TREATMENT. WITNESS CAPO WAS TREATED ON SCENE FOR MINOR LACERATIONS. MDFR #30 ALARM NUMBER 0003017. R/O OBSERVED HIM SITTING ON HIS VEHICLE AND HE APPEARED VERY CONFUSED. HE DID NOT REALIZE THAT HE WAS JUST INVOLVED IN A SERIOUS ACCIDENT. HE HAD A STRONG ODOR OF ALCOHOLIC BEVERAGE ON HIS BREATH AND BLOODSHOT/WATERY EYES. HE STATED HE WAS TIRED AND WANTED TO GO TO SLEEP. OFC. GIACOMONE OBSERVED A HALF EMPTY MINATURE BOTTLE OF JACK DANIEL'S WHISKEY LAYING ON THE DRIVERS' FLOOR BOARD OF HIS VEHICLE. AT THIS TIME HE VOLUNTARILY STATED TO SGT. MCLEOD, "I CAN NO LIE SARGE, I HAVE BEEN DRINKING TONIGHT." OFC. GIACOMONE ATTEMPTED TO OFFER FIELD SOBRIETY TESTS TO HIM, AT WHICH TIME HE SHOVED OFC. GIACOMONE IN THE CHEST. HE WAIVED HIS ARMS IN SUCH A MANNER AS TO PREVENT FROM BEING PLACED UNDER ARREST. HE ATTEMPTED TO PUSH R/O AND OFC. GIACOMONE AWAY FROM HIM, AT WHICH TIME HE WAS FORCIBLY PLACED UNDER ARREST. HE WAS TRANSPORTED TO WARD "D" WHERE

Hold for Other Agency
Agency _____ Verified by_____

☐ HOLD FOR BOND HEARING DO NOT BOND OUT
(Officer Must Appear at Bond Hearing)

☐ I understand that should I willfully fail to appear before the court as a required by this notice to appear that I may be

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☐ You need not appear in court but must comply with the instructions on the reverse side herein.

_____
Signature

I swear that the above Statement is correct and true to the best of my knowledge and belief.

Ofc. Westbrook
Officer's Name (Print)

[Signature: Ofc. Westbrook]
Officer's Signature

MIA Shores
Department Name

0113 (11)
Court ID Number/Loc Code

Sworn to and subscribed before me the undersigned authority, this 07 day of Jan 2000

[Signature: Illegible 3979]
Deputy of the Court or Notary Public

[STAMPED: I HEREBY CERTIFY that the foregoing is a true and correct copy of the original document.
[Signed: Illegible]

_____
(Signature of Immigration Officer)
UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
Miami District
11-21-00 Total of 1 pages
(Date)

COMPLAINT/ARREST AFFIDAVIT
CONTINUATION

[Handwritten

OBTS	**☒ Felony** **☒ Misdemeanor** **☒ Traffic** **☐ Juvenile** **☐ Warrant**	**Jail No** 1797	**Police Case No** 0180-00

IDS No	**Agency Code** 11	**Municiple PD Del ID No**	**MDPD Records and ID No**	**Court Case No** F00697

Defendant's Name LEOCAL, JOSUE	**DOB** 12/10/55	

NURSE PRACTIONER GARY THOMPSON DREW BLOOD FROM HIM. HE THEN WAS TRANSPORTED TO DCJ. * NOTE: WITNESS CAPO WAS THE FRONT, PASSENGER IN VICTIM WESTON'S VEHICLE.

Page 3 of 3]

Hold for Other Agency
Agency _____ Verified by_____

☐ HOLD FOR BOND HEARING DO NOT BOND OUT
(Officer Must Appear at Bond Hearing)

☐ I understand that should I willfully fail to appear before the court as a required by this notice to appear that I may be held in contempt of court and a warrant for my arrest shall be

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☐ You need not appear in court but must comply with the instructions on the reverse side herein.

_____
Signature

I swear that the above Statement is correct and true to the best of my knowledge and belief.

Ofc. Westbrook_____
Officer's Name (Print)

[Signature: Ofc. Westbrook]
Officer's Signature

MIA Shores
Department Name

0113 (11)_____
Court ID Number/Loc Code

Sworn to and subscribed before me the undersigned authority, this 07 day of Jan 2000

[Signature: Illegible 3979]_____
Deputy of the Court or Notary Public

[STAMPED: I HEREBY CERTIFY that the foregoing is a true and correct copy of the original document.
[Signed: Illegible]

(Signature of Immigration Officer)
UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
Miami District
11-21-00 Total of 1 pages
(Date)

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DATE COUNTY, FLORIDA FALL TERM, 1999

[Stamped: FILED
JAN 28 2000 CLERK]

THE STATE OF FLORIDA v.

JOSUE LEOCAL,

Defendant. **INFORMATION FOR**

1. DRIVING UNDER THE INFLUENCE CAUSING SERIOUS BODILY INJURY
316.193(3) (c) 2 FEL. 3D
2. DRIVING UNDER THE INFLUENCE CAUSING SERIOUS BODILY INJURY
316.193(3) (c) 2 FEL. 3D
3. BATTERY OF A LAW ENFORCEMENT OFFICER
784.07 & 784.03 FEL. 3D
4. RESISTING AN OFFICER WITH VIOLENCE
843.01 FEL. 3D

[Handwritten: Items Nos. 1 and 2. are circled. Handwritten margin note says: **"DOUBLE THEY CAN NOT DO"**

IN THE NAME AND BY AUTHORITY OF THE STATE OF FLORIDA:

SETH LAVEY, Assistant State Attorney of the Eleventh Judicial Circuit, on the authority of **KATHERINE**

FERNANDEZ RUNDLE, State Attorney, prosecuting for the State of Florida, in the County of Miami-Dade, under oath, information makes that: JOSUE LEOCAL, on or about JANUARY 7, 2000, in the County and State aforesaid, did unlawfully drive or be in actual physical control of a motor vehicle in Miami-Dade County while under the influence of alcoholic beverages, any chemical substance set forth in s. 877.111, Fla. Stat., or any substance controlled under s. 893, Fla. Stat., when affected to the extent that said defendant's normal faculties were impaired and/or while having a blood or breath alcohol level of 0,08 percent or higher and by reason of operation of said motor vehicle did cause serious bodily injury to another, to wit: SUEN CAPO, being in violation of s. 316(3) (c)2, Fla. Stat., contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

f:CPCCases/00697.doc (jar) 01/27/00
CIRCUIT COURT DIRECT FILE
Jail # 00-1797; Bkd. 01/07/00; CIN 0470441; B/M,
DOB: 12/10/55, SS# 263-99-2211
F00-697
J/Blake (012)

[STAMPED: I HEREBY CERTIFY that the foregoing is a true and correct copy of the original document.
[Signed: Illegible]

_____
(Signature of Immigration Officer)
UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
Miami District
11-21-00 Total of 1 pages
(Date)

COUNT 2

And the aforesaid Assistant State Attorney, under oath, further information makes that JOSUE LEOCAL, on or about JANUARY 7, 2000, in the County and State aforesaid, did unlawfully drive or be in actual physical control of a motor vehicle in Miami-Dade County while under the influence of alcoholic beverages, any chemical substance set forth in s. 877.111, Fla. Stat., or any substance controlled under s. 893, Fla. Stat., when affected to the extent that said defendant's normal faculties were impaired and/or while having a blood or breath alcohol level of 0.08 percent or higher and by reason of operation of said motor vehicle did cause serious bodily injury to another, to wit: THOMAS WESTON, being in violation of s. 316(3) (c)2, Fla. Stat., contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

[STAMPED: I HEREBY CERTIFY that the foregoing is a true and correct copy of the original document.
[Signed: Illegible]

(Signature of Immigration Officer)
UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
Miami District
11-21-00 Total of 1 pages
(Date)

COUNT 3

And the aforesaid Assistant State Attorney, under oath, further information makes that JOSUE LEOCAL, on or about JANUARY 7, 2000, in the County and State aforesaid, did unlawfully, feloniously and knowingly commit a battery upon OFFICER SERGIO CIACOMONE, a duly qualified law enforcement officer, while said person was then and there engaged in the lawful performance of duties, by actually and intentionally touching or striking said person against said person's will, in violation of s. 784.07 and s. 784.03, Fla. Stat., contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

[STAMPED: I HEREBY CERTIFY that the foregoing is a true and correct copy of the original document.
[Signed: Illegible]

(Signature of Immigration Officer)
UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
Miami District
11-21-00 Total of 1 pages
(Date)

COUNT 4

And the aforesaid Assistant State Attorney, under oath, further information makes that JOSUE LEOCAL, on or about JANUARY 7, 2000, in the County and State aforesaid, did unlawfully, knowingly, willfully and feloniously resist, obstruct or oppose OFFICERS SERGIO CIACOMONE and/or MATTHEW WESTBROOK, duly qualified law enforcement officers, in the lawful execution of a legal duty being performed by said officers, to wit: The detention and/or arrest of said defendant, and/or the investigation of said defendant for Driving Under the Influence, by the said defendant offering or doing violence to the persons of said officers, in violation of s. 843.01 Fla. Stat., contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

STATE OF FLORIDA, COUNTY OF MIAMI-DADE:

Personally known to me and appeared before me, the Assistant State Attorney of the Eleventh Judicial Circuit of Florida whose signature appears below, being first duly sworn, says that the allegations set forth in this Information are based upon facts which have been sworn to as true, by a material witness or witnesses, and which if true, would constitute the offenses therein charged, and that this prosecution is instituted in good faith.

[Handwritten - Signature Illegible]
Assistant State Attorney
Florida Bar # 129739
1350 NW 12th Avenue, Miami, FL (305) 547-0100

Sworn to and subscribed before me this 28th day of Jan, 2000

By [Handwritten - Illegible]
Deputy Clerk for the Clerk of the Courts
Notary Public
[Handwritten - Number Illegible]

[Stamped - Seal Affixed:
CIRCUIT AND COUNTY COURTS,
Dade County Florida]

[STAMPED: I HEREBY CERTIFY that the foregoing is a true and correct copy of the original document.
[Signed: Illegible]

(Signature of Immigration Officer)
UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
Miami District
11-21-00 Total of 1 pages
(Date)

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
155 South Miami Avenue, Suite 800
Miami, Florida 33130
(Hearing held via televideo to)
(Central Florida Reception Center, Orlando, Florida)

File No.: A 24 665 605 October 16, 2001

In the Matter of)
)
JOSUE LEOCAL,) IN REMOVAL PROCEEDINGS
)
Respondent)

CHARGE : Section 237(a)(2)(A)(iii), aggravated felony, after admission, as defined in Section 101(a)(43)(F)of the Act, to wit: a crime of violence as defined in Section 16 of Title 18 of the United States Code, for which a term of imprisonment imposed was one year or more.[1]

APPLICATION(s):, Withholding of Removal under Section 241(b)(3), and Withholding of Removal under Article 3 of the Convention Against Torture.

ON BEHALF OF RESPONDENT: ON BEHALF OF SERVICE:

[1] 'This matter comes outside of the jurisdiction of Chapa-Garza, v. INS, 243 F. 3d 921 (2001). Accordingly, as this occurs outside of the Fifth Circuit Court of Appeals, the law of the circuit applies, in this case, the 11th Circuit Court of Appeals. See Le v. INS, 196 F. 3d 1352 (1999).

Pro se[2]

Renata Aurelius, Esquire
Assistant District
Counsel
Immigration &
Nat. Service
7880 Biscayne Blvd.,
2nd Fl.
Miami, FL 33138

plm

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent in this case is a 45-year-old male native and citizen of Haiti, who was first issued a Notice To Appear (see Exhibit 1) by regular mail service on November 28th, 2000.

The respondent admitted certain of the allegations and denied certain of the allegations on April 17th, 2001.

The respondent did not admit that he was a native and citizen of Haiti. He did admit that he was paroled into the United States on or about August 5th of 1980, and that his status had been adjusted to that of a lawful permanent resident.

---

[2] The respondent in this case, first appeared before the Court on April 17th, 2001. The respondent had appeared previously on February 22nd, 2001, was advised of his rights, and, given an opportunity to find counsel. The respondent indicated that he was not able to find counsel. Accordingly, the Court, took pleadings in the respondent's case, on April 17th, 2001 and the respondent has proceeded on his own. It appears the respondent was simply unable to find counsel at no expense to the Government. Accordingly, the Court finds that the respondent has waived his right to counsel at no expense to the Government.

The Government offered a copy of the conviction records (see Exhibit 2), as well as a copy of the Form I-213 (see Exhibit 3), as well as the respondent's Form I-181, the Record of Creation of Lawful Permanent Residence (see Exhibit 4).

Based on Exhibits 2, 3 and 4, the Court sustained the charges, and found the respondent removable as charged.

The respondent was asked if he wished to designate a country of removal, and the respondent stated that he "designates anywhere other than Haiti".

The respondent was asked again to designate a country if he wished to do so.

plm

The respondent did not immediately designate a country of removal, after having been found to be removable, and, accordingly, the Court designated Haiti for the respondent.

The respondent was placed under oath, by the Court, and asked questions about his convictions.

The respondent explained the circumstances surrounding his convictions, and, the Court found that the respondent's testimony was not credible, based on certified court records that were submitted relating to the respondent's conviction (see Exhibit 2).

The Court found that the respondent also had been convicted of a particularly serious crime, and, took into

account the length of the sentence imposed, the type of crime involved, and whether or not the respondent was a danger to the community.

The Court found, after balancing these factors, that the respondent had, in fact, been convicted of a particularly serious crime.

The Court notes the respondent received a two and a half year sentence, for his conviction for driving under the influence causing serious bodily injury, and, additionally, that he received 253 days of credit for time served (see Exhibit 2).

Additionally, the Court notes that the respondent appears to have a problem with the use and abuse of alcohol, as apparently the respondent has been engaged, in a program for that in prison.

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The Court went through the application process with the respondent, and explained that he was eligible to apply for Deferral of Removal under Article 3 of the Convention Against Torture.

While the respondent's application (see Exhibit 5), checks the no box relating to torture, the fact that the respondent states that his parents were killed in his country, the Court reviewed, and adjudicated the application, in accordance with an official request under Article 3 of the Convention Against Torture.

The sole issue today is whether or not the respondent is eligible under the regulations for that form of relief.

FINDINGS OF FACT

The respondent testified as to his name, his marital status, and his children. A number of the respondent's family members appeared today. The respondent testified that he has three sons, and one daughter.

When asked about his occupation, he testified that he was a construction worker, a mechanic, and a welder.

The respondent stated that he went to prison on October 30th, 2000, and, that he had not had any problems with the law prior to that time.

The respondent testified that he arrived in the United States in 1980, coming with a cousin from Haiti. He testified that he was 24 years of age, after he departed.

plm

The respondent was asked about his highest level of education and, he stated he had five years of formal schooling, and that he learned a trade while he was in Haiti.

The respondent stated that he left Haiti because "things were not good for me." He testified, 111 had a cousin, so I left with him. He did not want me to leave me alone."

The respondent testified that both his mother and his father are deceased, and he testified that they apparently died during the chaos of the coup d'etat.

The respondent did not have death certificates, or pictures, of any funeral, stating, that no everyone in Haiti had cameras, and nothing was sent to him.

The respondent testified that he resided in the area of Robeteau with his parents prior to coming to the United States.

The respondent denied having left the United States to attend their funeral, and he testified, that he has not left the country since he came here.

The respondent testified that his father's occupation was that of a carpenter, and that his mother, worked in the home.

The respondent testified that he himself did not belong to any group or organization in Haiti, and there was no evidence presented that his mother or father belonged to any group or organization as well.

The respondent was asked the name of his cousin that he came with, and he gave his name as Gerald.

The respondent was asked if he had aunts or uncles in Haiti at this time. He testified that he didn't know, because he testified that he does not keep up with the people that are there.

The respondent was asked if he still feared returning to Haiti at this time. He testified affirmatively. When asked why this was, he testified, "based on my parents'

circumstances. The house of my parents is no longer there, it was burned down". He was asked how he knew this, and he testified that an aunt named Claudia had told him this.

The respondent stated that he had learned from her, that the house had been burned down.

The Court then asked the Government about the status of the charge, based on recent cases that have been decided. The Government relies on Le v. INS, supra, and notes, that the Matter of Chapa-Garza v. INS falls outside of the 11th Circuit, and is inapplicable in these proceedings.

On cross-examination, the Government asked a few questions.

The respondent was asked about his last contact with his aunt. He testified that she is deceased, and, when asked about what happened to his parents, he testified, "at that time, there was no police, no army, or anyone around."

The respondent was asked if he wished to say anything in addition regarding his case, and the respondent testified that

insurance paid for the damages, to the other vehicle that was involved in this accident, and he stated, and "I had no attorney", and "that's the reason I am where I am".

The Court asked the respondent if, in, fact, he did have an attorney (see Exhibit 2).

The respondent acknowledged having an attorney but stated, "he didn't do anything for me".

STATEMENT OF THE LAW

The Florida offense of driving under the influence, with serious bodily injury, is a "crime of violence" as required under the Immigration and Nationality Act, as a "aggravated felony" pursuant to Section 101(a)(43)(F), of the Act, and constitutes an aggravated felony, if the sentence is for one year or more.

In order to be eligible for withholding of removal, under the statute, the respondent must fear that it is "more likely than not" that his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group, or his political opinion.

In order to be eligible to pursue withholding of removal, under Section 241(b)(3)of the Immigration and Nationality Act, the respondent must not have been convicted of a "particularly serious crime". A particularly serious crime is determined after looking at the conviction itself, the term of

"more likely than not" that a government official, or someone acting under their consent, or acquiescence, would torture the respondent if he were to return. See Matter of S-V-, Int. Dec. 3430 (BIA May 9, 2000).

As evidence of eligibility under the Torture Convention, the Court can look to evidence including, but not limited to, evidence of past torture inflicted upon the applicant, evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured, evidence of gross, flagrant, or mass violations of human rights within the country of removal, or other relevant information regarding conditions in the country of removal.

Torture is defined as any act by which "severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him, or her, or a third person, information or a confession, punishing him, or her, for an act he or she, or a third person, has committed or is suspected of having committed, or intimidating, or coercing him, or her, or a third person, or, for any reason based on the discrimination of any kind, when such pain or suffering is inflicted by, or at the instigation of, or with the consent, or

acquiescence, of a public official or other person acting in an official capacity. Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman, or degrading treatment or punishment that do not amount to torture.

FINDINGS OF THE COURT

In this case, the Court finds that the respondent had, in fact, been convicted of a particularly serious crime.

The Court found the respondent's testimony, relating to his conviction, to not be credible. The Court notes, today, that the respondent has continued to make incredible statements relating to his conviction. The respondent contended when he was asked if there was anything else that he wished to add, regarding his conviction, that he did not have an attorney, and that is the reason that he is here.

When the respondent was asked questions, the respondent acknowledged that he did have, in fact, have an attorney, but "he didn't do anything for me".

There is no evidence to substantiate that contention in the record.

What is substantiated in the record, is the officiall record of conviction (see Exhibit 2), which notes that the respondent had been drinking heavily, was stopped, after having been in an accident, and, according to the officer's affidavit, apparently was not even aware that he had been in an accident.

In this case, the victim of the accident, had to be transported to the Jackson Memorial Hospital Trauma Center for treatment. Additionally, when the respondent had been approached regarding this event, the respondent became

argumentative, pushed a police officer, and, the officer had gone to the respondent, after detecting a strong odor of alcohol on his breath, and the fact that his eyes were bloodshot and watery. The respondent's only concern, immediately after the accident, was that he wanted to go to sleep.

The respondent became violent, and had to be forcibly restrained, and placed under arrest.

At that time, the respondent had to be transported to a special ward, where blood had to be forcibly taken, to determine that the respondent was intoxicated.

As stated, the record reflects, that the respondent did, in fact, have counsel, and, pled guilty to the offense, which the respondent also denied, resulting in a two and a half year prison sentence, as well as credit for time served, prior to the imposition of the two-and-a-half-year sentence, of 253 days, or, approximately three-quarters of one year. Under the circumstances, and the respondent's evasive statements, the Court finds the charge to be serious. The Court further finds, that the respondent's conviction is, in fact, for a crime of violence, and, based on evidence contained in the record, , that the

respondent still has an alcohol problem that he is receiving treatment for.

The respondent alleges that his insurance coverage paid for the damages, yet, this is not a mitigating factor.

The evidence is clear that serious injuries were involved, and, the respondent was apparently so drunk he was not able to be concerned about the individuals involved in the accident, rather, only wanted to sleep.

The Court finds, further, that the respondent, even if he were eligible to pursue a claim for withholding of removal under the statute, has failed to show that it is "more likely than not" that his life or freedom would be threatened in his country on account of a protected ground. The respondent testified that he fears returning to his country because of what occurred to his parents, apparently and immediately before, during, or immediately after the coup d'etat that took place in the early '90's.

The respondent testified that he was not a member of any group, or organization, and that, apparently, his parents were not members of any group or organization either.

The respondent testified that he learned from an aunt, now deceased, that the family home had been burned, and someone is renting the land. The respondent was not very clear, about his last communications with anyone in Haiti, and he did state, that he does not continue to speak to anyone there at this time.

Knowing that, even if he were eligible to pursue his claim, the Court would find that the respondent has failed to meet his burden of proof and persuasion, to establish eligibility for withholding of removal under the statute.

Turning to any potential claim under Article 3 of the Convention Against Torture, the respondent has failed to show that it is "more likely than not", that a government official, or someone acting under their consent and/or acquiescence, would torture the respondent if he were to return.

The Court notes that no claim has been made regarding prison conditions that exist in Haiti, and the issue, that has surfaced recently relating to the detention of individuals, that are deported from the United States to Haiti. The Court finds that no torture claim, exists, based on the evidence contained in the record.

The Court turns first, in its analysis, to any potential claim when reviewing the current Country Report (see Exhibit 8) for Haiti, specifically, at page 5 and following. The Country Report notes that since this past March 24th, individuals who have served sentences outside of Haiti, are kept in jail, with no time table for their eventual release. The reason given for this is that "preventative measures" are being taken to prevent "bandits" from increasing the level of insecurity and crime in the country. Haiti is a sovereign country. The duly elected government of Haiti, can take whatever action it deems

appropriate, to protect the safety of its citizens, within its boundaries.

The Court notes that while the Country Report states that prison conditions in Haiti are poor, it does note that they, as well as health care services, improving slowly".

Then the next regard, the definition of torture under offered to inmates "are the Court looks specifically, at the regulations. See 8 C. F. R. Section 208.18(a)(11, (2).

Under the regulations, torture is defined as "an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman, or degrading treatment or punishment that do not amount to torture".

The regulations continue further at sub part 3, "torture does not include pain or suffering arising only from an inherent or incidental to lawful sanctions. Lawful sanctions include judicially imposed sanctions and other enforcement actions authorized by law, including the death penalty, but do not include sanctions that defeat the object and purpose of the Convention Against Torture to prohibit torture."

In this case, the Court finds, that simply detaining the respondent, upon return to his country, does not amount to torture, under the definitions contained in the regulations. The purpose listed in the Country Report, of detaining individuals, is not to torture them, it is to protect the public. The Country

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Report notes that international human rights organizations, in fact go to these institutions, and, as stated, the conditions in them are better.

While there is no evidence to establish, that different classes of individuals, are, in fact, detained, in this case, the respondent, not having been convicted of murder, theft, rape, robbery or other serious crime of violence, it is unlikely that the respondent would be detained at any length longer than individuals that have been convicted of such serious crimes.

While the Court does not condone the respondent's conviction, the injury, and ensuing costs, the Court notes, that it is unlikely that the respondent himself, would suffer, prolonged detention, or suffering, based on the conviction that he, in fact, has been convicted of in the United States.

Accordingly, after analyzing all of the factors, the case law, as well as the regulations, the Court finds that the respondent has failed to establish eligibility for relief under the Torture Convention, and, additionally, for withholding of removal under the statute, if the respondent were, in fact, eligible to pursue an application for that form of relief.

Accordingly, the following Orders are hereby

entered.

plm

ORDER

WHEREFORE IT IS HEREBY ORDERED that the respondent's Application for Withholding of Removal, under

Section 241(b)(3) of the Immigration and Nationality Act, be and is pretermitted.

FURTHER ORDER

WHEREFORE IT IS FURTHER ORDERED that the respondent's Application for Relief Under Article 3 of the Torture Convention be and is denied.

FURTHER ORDER

WHEREFORE IT IS FURTHER ORDERED that the respondent be removed from the United States to Haiti on the charges contained in the Notice To Appear.

[Signature: Rex. J. Ford]

REX J. FORD
United States Immigration Judge

DATED: October 16th, 2001.

A 24 655 605 15 October 16, 2001

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE REX J FORD, in the matter of:

JOSUE LEOCAL
A 24 655 605
Miami, Florida

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office For Immigration Review.

[Signature: Patrice L. McDonald]

(Patricia L. McDonald, Transcriber)
Deposition Services, Inc.
6245 Executive Boulevard
Rockville, Maryland 20852
(301)881-3344

November 26, 2001
(Completion Date)

IMMIGRATION COURT
155 SOUTH MIAMI AVE., ROOM 800
MIAMI, FL 33130

In the Matter of

Case No. : A24-665-605

*S-LEOCAL, JOSUE
Respondent IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on [Handwritten: 10/16/2001] this memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[X] The respondent was ordered removed from the United States to [Handwritten: Haiti] or in the alternative to [Handwritten: N/A]

[ ] Respondent's application for voluntary departure was granted until
upon posting a bond in the amount of $
_____
with an alternate order of removal to

[ ] Respondent's application for asylum was ( ) granted ( ) denied ( ) withdrawn.

[X] Respondent's application for withholding of removal was ( ) granted ( ) denied ( ) withdrawn. [(X) Handwritten: PRETERMITTED]

[ ] Respondent's application for cancellation of removal under section 241A(a) was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's application for cancellation of removal was ( ) granted under section 240A(b)(1) ( ) granted under section 240A(b)(2) ( ) denied ( ) withdrawn. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's application for a waiver under section _____ of the INA was ( ) granted ( ) denied ( ) withdrawn or ( ) other.

[ ] Respondent's application for adjustment of status under section _____ of the INA was ( ) granted ( ) denied ( ) withdrawn. If granted, it was ordered that respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's status was rescinded under section 246.

[ ] Respondent is admitted to the United States as a _____ until _____.

[ ] As a condition of admission, respondent is to post a $ _____ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

[ ] Proceedings were terminated.

[X] Other: [Handwritten: DENIED].

Date: [Handwritten: 10/16/2001]

Appeal: Waived/ (Reserved) Appeal Due By:

[Handwritten: 11/15/2001]

[Signature: Rex J. Ford]
REX J. FORD
Immigration Judge

ALIEN NUMBER: 24-665-605
ALIEN NAME: *-LEOCAL, JOSUE

CERTIFICATE OF SERVICE
THIS DOCUMENT WAS SERVED BY: MAIL (M)
PERSONAL SERVICE (P)

TO: [X] ALIEN [ ] ALIEN c/o Customs Officer [ ]
ALIEN's ATT/REP [X] INS

DATE: [Handwritten: 10/16/2001] BY:
~~COURT STAFF~~ [Handwritten: Judge (RJF)]
Attachments: [ ] EOIR-33 [ ] EOIR-28 [ ]
Legal Services List [X] Other [Handwritten: Appeal (UI)]

U. S. Department of Justice
Executive Office for
Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration of Appeals

File: A24-665-605 -ORLANDO

Date: [STAMPED: APR 2 4 2002]

In re: *S-LEOCAL, JOSUE

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Jeffrey S. Bucholtz

ON BEHALF OF SERVICE: Renata Terziev Aurelius

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. See 8 C.F.R. § 3.1(a)(7).

[Signature: Illegible]
FOR THE BOARD

[STAMPED: RECEIVED DEPARTMENT OF JUSTICE
2002 APR 26 AM 10:44
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
IMMIGRATION COURT
MIAMI, FLORIDA]

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A24 665 605 - Orlando Date: AUG 2 9 2002

In re: JOSUE LEOCAL

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:
Jeffrey S. Bucholtz, Esquire,
Jeffrey T. Tao, Esquire
KING & SPALDING
1730 Pennsylvania Avenue, N.W.
Washington, DC 20006

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony

APPLICATION: Reopening

By order dated April 24, 2002, this Board summarily affirmed the Immigration Judge's decision, dated October 16, 2001, finding the respondent removable as charged, denying his application for withholding of removal under section 241(b)(3) of the Immigration and Nationality Act, denying his application for protection under Article 3 of

the Convention Against Torture (`the Convention"), 8 C.F.R. §§ 208.16-18 (2002), and ordering him removed to Haiti. Due to exceptional circumstances, however, we deem it appropriate to reopen the respondent's removal proceedings on our own motion, pursuant to 8 C.F.R. § 3.2(a).[3] Accordingly, we will vacate our April 24 decision and reinstate the respondent's appeal. We will also grant the respondent's motion to accept supplemental brief. The appeal will be dismissed.

As a threshold matter, we will address the respondent's challenge to the Immigration Judge's conclusion that he is removable as an alien convicted of an aggravated felony. On October 30, 2000, the respondent was convicted in the Circuit Court of Dade County, Florida, of the offense of driving under the influence with serious bodily injury, in violation of section 316.193(3)(c)(2) of the Florida Statutes, a third-degree felony for which he was sentenced, to a 2 ½-year term of imprisonment. *Exh.* 2. On the basis of this offense, the Immigration and Naturalization Service charged the respondent with removability as an alien convicted of an aggravated felony. Section 237(a)(2)(A)(iii) of the Act. The Immigration Judge sustained the charge of removability. We affirm.

The United States Court of Appeals for the Eleventh Circuit, in whose jurisdiction this proceeding arises, holds that the Florida offense of driving under the influence with

[3] Due to a clerical error, our April 24, 2002, decision was not served upon the respondent in the manner prescribed by 8 C.F.R. § 3.1(f). We are satisfied that this error materially prejudiced the respondent, warranting sua sponte reopening. Because we have reopened the respondent's removal proceedings sua sponte, his July 12, 2002, motion seeking re-issuance of our April 24 order is denied as moot.

serious bodily injury is a "crime of violence" under 18 U.S.C. § 16(a) and an aggravated felony under section 101(a)(43)(F) of the Act. *Le v. U.S. Attorney General,* 196 F.3d 1352 (11th Cir. 1999). Because the respondent was convicted under the identical statute at issue in *Le,* we conclude that *Le* is controlling authority in this case.

We are unpersuaded by the respondent's argument, advanced in his supplemental appellate brief, that *Le* has been superseded, or at least rendered distinguishable, by this Board's recent precedent decision in *Matter of Ramos,* 23 I&N Dec. 336 (BIA 2002), where we held that the Massachusetts offense of driving under the influence of intoxicating liquor was not an aggravated felony. We clearly stated in *Matter of Ramos* that we would "follow the law of the circuit in those circuits that have addressed the question whether driving under the influence is a crime of violence." Id. at 346-47. We made this statement because the meaning of the term "crime of violence" under 18 U.S.C. § 16 is a matter of federal criminal law, and we have long recognized our obligation to defer to circuit court interpretations of provisions of federal criminal law. *Matter of Yanez,* 23 I&N Dec. 390, 396-97 (BIA 2002); *Matter of Anselmo,* 20 I&N Dec. 25 (BIA 1989). Thus, the circuits need not defer to our reading of 18 U.S.C. § 16. *Adams Fruit Co., Inc. v. Barrett,* 494 U.S. 638 (1990) (explaining that deference does not extend to an agency's interpretation of a judicially enforceable portion of a statute). Because we lack authority to unilaterally modify the law of the Eleventh Circuit as it relates to federal criminal statutes such as 18 U.S.C. § 16, we will follow *Le* and affirm the Immigration Judge's finding of removability.

We also affirm the Immigration Judge's conclusion that the respondent failed to satisfy his burden of proving eligibility for withholding of removal under section

241(b)(3) of the Act or protection under the Convention. Specifically, the respondent failed to demonstrate either that it is more likely than not that his life or freedom will be threatened in Haiti on account of a protected ground, or that he will more likely than not be tortured in Haiti by or with the consent or acquiescence of a public official acting in an official capacity. 8 C.F.R. §§ 208.16(b), 208.16(c), 208.18(a) (2002). Because we agree with the Immigration Judge's decision denying the respondent's requests for withholding and deferral of removal on the merits, we need not decide whether the respondent's conviction for an aggravated felony constitutes a "particularly serious crime" under section 241(b)(3)(B)(ii) of the Act, so as to render him ineligible for withholding of removal.

Accordingly, the following orders shall be issued.

ORDER: This Board's April 24, 2002, decision is vacated, and the removal proceedings are reopened pursuant to 8 C.F.R. § 3.2(a).

FURTHER ORDER: The respondent's motion to accept supplemental brief is granted.

FURTHER ORDER: The respondent's appeal is dismissed, and the respondent is ordered removed to Haiti.

[Signature: Kevin A. Ohlson]

United States Court of Appeals

Eleventh Circuit
56 Forsyth Street, N. W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

In Replying Give
Number Clerk Of Case
And Names of Parties

September 20,2002

MEMORANDUM TO COUNSEL OR PARTIES

RE: 02-14992 F Josue Leocal v. U. S. Attorney General
AGCY NO.: A24-665-605

After review of the agency's order and the petition for review, application for enforcement, or cross-application for enforcement, it appears that this court may lack jurisdiction over this appeal. If it is determined that this court is without jurisdiction, this appeal will be dismissed.

The parties are requested to simultaneously advise the court in writing within fourteen (14) days from the date of this letter of their position regarding the jurisdictional question(s) set forth on the attached page. An original plus three copies of any response should be filed. The responses must include a Certificate of Interested Persons and Corporate Disclosure Statement as described in Fed. R. App. P. 26.1 and the corresponding circuit rules. Requests for extensions of time to file a response may not be entertained. Please do not address any other issues on appeal at this time.

After fourteen (14) days, this court will consider any response(s) received and any portion of the record that may be required to resolve the jurisdictional issue(s). The parties will be advised by this office of the court's determination and of any further actions which may be required.

Sincerely,

THOMAS K. KAHN, Clerk

Reply To: Mildred Norwood/
w1/404-335-6185

Encl.

JUR-7 (1-1999)

NO. 02-14992-F

JURISDICTIONAL QUESTION(S)

I. **What law governs judicial review of this petition for review:**

A. "The permanent rules" in Immigration and Nationality Act ("INA") § 242 et seq. (8 U. S. C. § 1252 et seq.), as amended by the Illegal Immigration Reform and Immigrant Responsibility Act (" IIRIRA") § 306(a)(2), Pub. L. No. 104-208,110 Stat. 3009 (Sept. 30, 1996); or

B. "The transitional rules" in INA § 106 (8 U.S.C. § 1105a)and IIRIRA § 309(c)(4)(note to 8 U.S.C. § 1101)

See IIRIRA §§306(c)(1), 309(a)&(c)(l), as amended by technical correction Pub. L. 104-302, §2, 110 Stat. 3657 (Oct. 11, 1996); Lettman v. Reno, 168 F. 3d 463 (11th Cir.), vacated in part and reh'g granted, 185 F. 3d 1216 (11th Cir. 1999).

II. **Reviewability**

A. If the transitional rules govern:

1. Address whether IIRIRA § 309(c)(4)(G) limits this Court's jurisdiction over this petition for review. See Lettman, 168 F. 3d at 464-65.

2. If § 309(c)(4)(G) applies, address whether the specific constitutional challenges, if any, raised by petitioner, are reviewable. See Farauharson v. Attorney General, 246 F. 3d 1317, 1322 (11th Cir. 2001).

3. If petitioner seeks judicial review of the denial of discretionary relief, does IIRIRA § 309(c)(4)(E) preclude this Court's jurisdiction over that decision. See Al Najjar v. Ashcroft, 257 F. 3d 1262, 1297-98 (11th Cir. 2001).

B. If the permanent rules govern:

1. Address whether INA § 242(a)(2)(C) limits this Court's jurisdiction over this petition for review. See Calcano-Martinez v. INS, 533 U. S. 348,350-52, 121 S. Ct. 2268, 2269-70, 150 L. Ed.2d 392 (2001).

2. If § 242(a)(2)(C) applies, address whether the specific constitutional challenges, if any, raised by petitioner, are reviewable. See Brooks v. Ashcroft, 283 F. 3d 1268, 1273-75 (11th Cir. 2002).

3. If petitioner seeks judicial review of the denial of discretionary relief, does INA 3 242(a)(2)(B) preclude this Court's jurisdiction if the BIA did not exercise any discretion in denying the requested relief? Cf. Al Najiar, 257 F. 3d at 1297-98.

IN THE UNITED STATES COURT OF APPEALS,

FOR THE ELEVENTH CIRCUIT

NO. 02-14992-F

[STAMPED: FILED U.S. COURT OF APPEALS ELEVENTH CIRCUIT NOV 29 2002 THOMAS K. KHAN CLERK]

JOSUE LEOCAL,

Petitioner,

versus

U. S. ATTORNEY GENERAL,
IMMIGRATION AND NATURALIZATION SERVICE,

Respondents,

On Petition for Review of a Final Order of the Board of Immigration Appeals

---

Before DUBINA, BARKETT, and MARCUS, Circuit Judges.

BY THE COURT:

The U. S. Attorney General's motion to dismiss the petition for review for lack of jurisdiction is CARRIED WITH THE CASE.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-14992
Non-Argument Calendar

Agency Docket No. A24-665-605

[STAMPED: June 30, 2003]

JOSUE LEOCAL,

Petitioner,

versus

U.S. ATTORNEY GENERAL,
IMMIGRATION AND NATURALIZATION
SERVICE;

Respondents.

On Petition for Review of A Final Decision of
the Board of Immigration Appeals

Before ANDERSON, BIRCH, and CARNES, Circuit Judges.

PER CURIAM:

Josue Leocal petitions for review of the Board of Immigration Appeals' ("BIA's") final removal order, entered August 29, 2002. The BIA ordered Leocal removed as an aggravated felon, finding that his conviction under Fla. Stat. § 316.193(3)(c)2 for driving under the influence ("DUI") causing serious bodily injury qualifies as a "crime of violence" under 18 U.S.C. § 16.

The government, arguing that we lack jurisdiction, moved to dismiss the petition. We agree.

We review our subject-matter jurisdiction de novo. See Brooks v. Ashcroft, 283 F.3d 1268, 1272 (11th Cir. 2002).

As Leocal's removal proceedings commenced in 2000, the permanent rules of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996) ("IIRIRA") govern his petition for review. See e.g., Brooks, 283 F.3d at 1272, n. 4 (The IIRIRA applies to removal proceedings initiated after April 1, 1997). Under the IIRIRA, judicial review of removal orders is more limited than it had been under the Immigration and Nationality Act ("INA"). 8 U.S.C. § 1252(a)(2)(C); See Calcano-Martinez v. Immigration & Naturalization Serv., 533 U.S. 348, 350, 121 S.Ct. 2268, 2270 (2001); Brooks, 283 F.3d at 1272. Given the limits of § 1252(a)(2)(C), we retain jurisdiction only to determine whether Leocal is "(1) an alien (2) who is removable (3) based on a conviction for an offense enumerated in the statute."[4] Galindo-Del Valle v. Attorney General, 213 F.3d 594, 598 (11th Cir. 2000), cert. denied, 533 U.S. 949 (2001). Among those offenses enumerated in the statute is 8 U.S.C. § 1227(a)(2)(A)(iii), which allows for removal of an alien convicted of an aggravated felony after admission into the United States. Thus, if Leocal is an alien who is removable based on an aggravated felony conviction, § 1252(a)(2)(C) divests us of jurisdiction to review the removal order. Leocal does not dispute that he is an alien, so we turn to the question of whether his conviction renders him removable as an aggravated felon.

[4] Notwithstanding the jurisdictional bar in § 1252(a)(2)(C), we retain jurisdiction to consider "substantial constitutional issues" arising out of the alien's removal proceedings. See Brooks, 283 F.3d at 1273. Leocal does not raise any constitutional issues on appeal.

The INA defines the term "aggravated felony" as "a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment is at least one year." 8 U.S.C. § 1101(a)(43)(F). Since Leocal received a 2 1/2 year prison sentence, the parties have focused on whether his conviction under Fla. Stat. § 316.193(3)(c)2 was for a "crime of violence" as defined by 18 U.S.C. § 16. In Le v. United States Attorney Gen., 196 F.3d 1352, 1354 (11th Cir. 1999), a panel of this Court squarely held that it is.

"[I]t is the firmly established rule of this Circuit that each succeeding panel is bound by the holding of the first panel to address an issue of law, unless and until that holding is overruled en banc, or by the Supreme Court." United States v. Hogan, 986 F.2d 1364, 1369 (11th Cir. 1993). Accordingly, Leocal's arguments as to the wisdom of the Le decision in light of BIA's new interpretation and the rulings of our sister Circuits are unavailing. Further, Leocal's arguments that we are not bound by Le because that panel deferred to the BIA's old interpretation are based on a misreading of Le. The Le Court did say that it would review the issue de novo but defer to a reasonable interpretation of the BIA. 196 F.23d at 1353-54. However, the Court's language and analysis clearly demonstrate that it made a binding, de novo determination that a DUI that causes serious bodily injury to another is a crime of violence. Id. at 1354.

We are divested of jurisdiction to review Leocal's removal order.

DISMISSED.

Supreme Court, U.S.
FILED
MAY 10 2004
OFFICE OF THE CLERK

(4)

No. 03-583

IN THE

Supreme Court of the United States

JOSUE LEOCAL,

Petitioner,

v.

JOHN D. ASHCROFT, UNITED STATES ATTORNEY GENERAL, AND IMMIGRATION AND NATURALIZATION SERVICE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR PETITIONER

J. SEDWICK SOLLERS III
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MICHAEL J. CIATTI
JESSICA S. CHAMPA
AUGUSTA M. RIDLEY
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KING & SPALDING LLP
1730 Pennsylvania Ave., NW
Washington, D.C. 20006
(202) 737-0500
Attorneys for Josue Leocal

QUESTION PRESENTED

Whether a conviction for driving under the influence with serious bodily injury under a state statute, such as Fla. Stat. § 316.193(3), which requires proof of causing injury to another, but (i) does not require proof, or involve a substantial risk, of the intentional (or even reckless) application of physical force against the person or property of another, and (ii) does not require proof of any active application of physical force by a defendant against the person of property of another, is a crime of violence under 18 U.S.C. § 16, that constitutes an aggravated felony under § 101 of the Immigration and Nationality Act and therefore a basis for removal of a non-U.S. citizen from the United States.

PARTIES TO THE PROCEEDINGS BELOW

The caption of this case contains the names of all the parties to the proceedings in the courts below. Petitioner Josue Leocal was the petitioner in the court of appeals. Respondents, John D. Ashcroft, the United States Attorney General, and the Immigration and Naturalization Service, were the respondents in the court of appeals. Petitioner Josue Leocal was the respondent before the Board of Immigration Appeals and the Immigration and Naturalization Service was the only other party before the Board of Immigration Appeals.

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No. 03-583

IN THE

Supreme Court of the United States

JOSUE LEOCAL,

Petitioner,

v.

JOHN D. ASHCROFT, UNITED STATES ATTORNEY GENERAL, AND IMMIGRATION AND NATURALIZATION SERVICE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR PETITIONER

Petitioner respectfully requests that this Court vacate the order of the United States Court of Appeals for the Eleventh Circuit which dismissed petitioner's petition for review for lack of jurisdiction and direct the court of appeals to exercise jurisdiction over the petition for review and vacate the removal order against petitioner.

OPINIONS BELOW

The opinion of the court of appeals is unpublished and is reproduced at J.A. 115-17. The opinion of the Board of Immigration Appeals is unpublished and is reproduced at J.A. 105-08.

JURISDICTION

The court of appeals dismissed the petition for review on June 30, 2003. Petitioner timely filed a petition for a writ of certiorari on September 29, 2003. On February 23, 2004, this Court granted certiorari. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The statutes relevant to this proceeding are 8 U.S.C. § 1101(a)(43)(F), 8 U.S.C. § 1101(h), 8 U.S.C. § 1182(a)(2)(E), 18 U.S.C. § 16, and Fla. Stat. § 316.193(3)(c)(2). They are reprinted in the appendix to this brief.

STATEMENT

A. Facts

Petitioner Josue Leocal entered the United States from Haiti in August 1980 at the age of 24. R. 286. He resided in Miami, Florida. *Id.* He married a U.S. citizen and has four children, all of whom are U.S. citizens. R. 181, 210-11, 288-94. Mr. Leocal worked in the United States as a construction worker, mechanic and welder. R. 211. As of December 19, 1987, Mr. Leocal became a lawful permanent resident, and he applied for naturalization in March 1997. R. 297-98. At the time of the conviction that is the subject of this matter (in 2000), Mr. Leocal had been in the United States for more than 19 years and he had no prior criminal record. R. 211. In August 2000, he was determined to be ineligible to naturalize based on the conviction at issue in this case. R. 298.

On January 7, 2000, Mr. Leocal was arrested following a car accident in Miami-Dade County in which two individuals were injured. R. 331-35. One of those injured in the accident was treated and released at the scene of the accident. R. 333. The other was transported to Jackson Memorial Hospital's Trauma Center for treatment. *Id.* Mr. Leocal later pleaded guilty to two counts of driving under the influence of alcohol and causing serious bodily injury, in violation of Fla. Stat. § 316.193(3)(c)(2) (2001). R. 322. Although Mr. Leocal had no prior criminal record, the circuit court for Dade County sentenced him to 2.5 years in prison on the first count and 2.5 years of probation on the second. R. 325.

Mr. Leocal served more than two years of his sentence, during which time he completed a ten-month course of treatment for alcohol abuse. R. 290. Mr. Leocal was released from prison into the custody of the Immigration and Naturalization Service ("INS") in April 2002. On November 18, 2002, the INS removed Mr. Leocal to Haiti, without notice to his legal counsel of record either before or after his removal. Mr. Leocal's counsel only learned of his removal after trying to contact him to discuss his on-going appeal in the Eleventh Circuit.

B. Procedural History

On November 22, 2000, Mr. Leocal received a notice to appear charging him as removable pursuant to INA § 237(a)(2)(A)(iii) for having committed an "aggravated felony" as defined in INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F) (2002). R. 364-66. The removal proceeding was based on Mr. Leocal's Florida conviction for DUI with serious bodily injury, Fla. Stat. § 316.193(3)(c)(2), which the INS deemed a "crime of violence" as defined in 18 U.S.C. § 16. *Id.* The "aggravated felony" charge was the only charge contained in the notice to appear and the only asserted basis for Mr. Leocal's removal. *Id.*

On October 16, 2001, an immigration judge ordered Mr. Leocal removed to Haiti. J.A. 83, 97-102. In doing so, the immigration judge relied on *Le v. Attorney General*, 196 F.3d 1352 (11th Cir. 1999) (per curiam), because Mr. Leocal's removal proceedings were instituted within the Eleventh Circuit. J.A. 89-90. In *Le*, the Eleventh Circuit endorsed as reasonable the Board of Immigration Appeals' ("BIA" or "the Board") 1998 decision that a conviction for DUI with serious bodily injury under Fla. Stat. § 316.193(3)(c)(2) is a "crime of violence" under 18 U.S.C. § 16(a). 196 F.3d at 1354. The immigration judge ruled that Mr. Leocal was ineligible for various forms of relief from the order. Mr. Leocal filed a timely notice of appeal to the BIA on November 5, 2001. J.A. ii. On April 24, 2002, the BIA affirmed the immigration judge's decision and dismissed the appeal. J.A. 104. Because of a clerical error (the Board used the incorrect address for Mr. Leocal's counsel), the decision was not served on Mr. Leocal or his counsel. J.A. 106.

Prior to learning that the BIA had issued a decision, counsel for petitioner filed a supplemental brief in light of the Board's issuance of *Matter of Ramos*, 23 I. & N. Dec. 336 (BIA Apr. 4, 2002) (en banc), R. 29-39, in which the Board announced that it would take a new approach in DUI cases -- specifically, it concluded that DUI offenses do not constitute "crimes of violence" under § 16(b). 23 I. & N. Dec. at 346-47. Petitioner urged the Board to consider whether his offense constituted an aggravated felony in light of *Ramos*. R. 29-39. Petitioner argued that the Board was not bound to follow *Le* and could consider *de novo* the question of whether Mr. Leocal's DUI offenses constituted "crimes of violence," because the court in *Le* had not "squarely addressed" the issue. Although the Board in *Ramos* said that it would continue to follow the precedent in circuits that had decided the issue, petitioner argued that in *Le*, the Eleventh Circuit had not done so, but rather had

deferred to the Board's prior approach as reasonable. Therefore, petitioner urged the Board to consider, in light of *Ramos*, whether DUI with serious bodily injury under the Florida statute was a crime of violence.

On August 29, 2002, the Board reopened Mr. Leocal's case, vacated its April 24, 2002 decision, and issued a new decision, but again affirmed the immigration judge's finding of removability. J.A. 105-08. The Board reasoned that although *Ramos* may support Mr. Leocal's position, the Board nevertheless had to apply the Eleventh Circuit's ruling in *Le*, because Mr. Leocal's case arose within the Eleventh Circuit. J.A. 107. Following the Eleventh Circuit's approach in *Le*, the Board dismissed petitioner's appeal because he had been convicted of a "crime of violence" under § 16(a) and thus, an aggravated felony.

Mr. Leocal filed a petition for review of the BIA's decision in the Eleventh Circuit. J.A. iii. The court of appeals requested briefing regarding the court's jurisdiction to consider the petition for review. J.A. 109-12. Following receipt of briefs from the parties, the court ordered that it would carry the jurisdictional issue with the case. J.A. 113-14. On June 30, 2003, after considering briefs on the merits, but without oral argument, the court of appeals dismissed the petition for review. J.A. 115-17. In doing so, the court of appeals agreed with the government's position that the court lacked jurisdiction over Mr. Leocal's case under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996) ("IIRIRA"), which limits judicial review of removal orders. The court of appeals concluded that it was bound to follow the panel decision in *Le*, because, in its view, the *Le* panel had concluded that a DUI offense under the same Florida statute constitutes a "crime of violence" under 18 U.S.C. § 16. Accordingly, the court dismissed the petition for review on grounds that it lacked jurisdiction to review an order of

removal for a non-U.S. citizen, permanent resident, who has been convicted of an aggravated felony.

In reaching this conclusion, the Eleventh Circuit rejected petitioner's argument that the court was not bound to follow *Le* because the court of appeals had simply deferred to and affirmed the Board's position as reasonable rather than independently interpreting 18 U.S.C. § 16. When *Le* was decided, the Board still considered all DUI offenses crimes of violence under *Matter of Puente*, 22 I. & N. Dec. 1006 (BIA 1999) (en banc), *withdrawn by Matter of Ramos*, 23 I. & N. Dec. 336 (BIA April 4, 2002) (en banc). Despite petitioner's argument that *Le* did not control his case or preclude the court of appeals from holding that the Board's new approach articulated in *Ramos* is reasonable, the court of appeals ruled that the court in *Le* had "squarely decided" the issue and therefore it lacked jurisdiction to review petitioner's case. The Eleventh Circuit thus relied on its earlier decision in *Le* as the basis for its conclusion that DUI with serious bodily injury under the same Florida statute is a crime of violence under 18 U.S.C. § 16.

Mr. Leocal seeks an order from this Court vacating the Eleventh Circuit's order that it lacks jurisdiction over his petition because his conviction qualifies as a "crime of violence," and thus, an aggravated felony, and directing the Eleventh Circuit to exercise jurisdiction over his petition for review and vacate the BIA's removal order against Mr. Leocal. This result will allow Mr. Leocal to pursue a return to the United States to re-join his family and continue his life here.

SUMMARY OF ARGUMENT

This Court should vacate the Eleventh Circuit's order below and direct the Eleventh Circuit to exercise jurisdiction over Mr. Leocal's petition for review and vacate the removal order in this matter. The Court should take this action because petitioner's violation of Fla. Stat. § 316.193(3)(c)(2), which involved an unfortunate and regrettable event for which petitioner admitted guilt and served over two years in prison, does not qualify as a "crime of violence" under the strict requirements of 18 U.S.C. § 16 because it does not have "as an element the use . . . of physical force against the person or property of another" and does not involve "substantial risk that physical force . . . may be used" against the person or property of another.

First, petitioner's conviction was based on a statute that, like many DUI statutes, has as an element the causation of injury to another, but that does not require that petitioner "use" force, as that term is commonly understood, to cause such injury. The plain meaning of "use" requires the intentional application of physical force against another, but does not encompass the accidental, unintentional or even negligent applications of force that occur in DUI offenses. Similarly, under this plain meaning of "use," DUI offenses (including petitioner's) also do not present "a substantial risk that physical force . . . may be used" during the offense, because any force applied in DUI accidents is typically unintentional.

Second, petitioner's conviction fails to qualify as a crime of violence because, regardless of whether or not one interprets "use" to require intentional application of force, the Florida statute (like many other DUI statutes) does not require proof that a defendant actually applied any physical force whatsoever to a victim. An individual can be convicted under the Florida statute at issue in this case (as well as other state statutes that lack a *mens rea* of intent)

based upon proof of the following: intoxication, operation of a motor vehicle and causation of injury to another as a result of operating the vehicle. Conviction does not require proof of the application of any physical force to the injured victim.

Finally, in addition to the fact that the plain meaning of § 16 demonstrates that DUI offenses involving injury to others do not qualify as "crimes of violence," the use of the term "crime of violence" in another provision of the INA that also refers separately to DUI offenses involving injury (8 U.S.C. § 1101(h)) reflects Congressional understanding that DUI offenses involving personal injury to others are not covered by 18 U.S.C. § 16. Specifically, in § 1101(h) Congress defined "serious criminal offense" to include: (i) any felony, (ii) a "crime of violence" as defined by § 16, *or* (iii) "any crime of reckless driving or of driving while intoxicated or under the influence of alcohol or of prohibited substances if such crime involves personal injury to another." Because Congress does not include superfluous terms in statutes, the express listing of DUI/DWI offenses involving injury to others separately from "crimes of violence" demonstrates Congress' understanding that the latter does not include the former.

For all of these reasons, petitioner respectfully requests this Court to vacate the order of the Eleventh Circuit and to direct the Eleventh Circuit to exercise jurisdiction over the petition for review and vacate the removal order against petitioner.

ARGUMENT

I. DUI WITH SERIOUS BODILY INJURY UNDER FLA. STAT. § 316.193(3)(c)(2) IS NOT A CRIME OF VIOLENCE UNDER 18 U.S.C. § 16(a) BECAUSE IT DOES NOT HAVE "AS AN ELEMENT THE USE, ATTEMPTED USE, OR THREATENED USE OF PHYSICAL FORCE AGAINST THE PERSON OR PROPERTY OF ANOTHER."

Despite a strong national policy in favor of uniform application of the immigration laws, whether someone who is not a U.S. citizen is removable for conviction of a DUI offense that involves injury to others varies dramatically among the circuits. The lack of uniformity results from the variations among the states' DUI statutes, as well as the different approaches within circuits in analyzing whether these DUI offenses constitute aggravated felonies. The lack of uniformity has been reinforced by the Board's decision in *Ramos*, in which it announced that the Board would no longer consider DUI offenses as crimes of violence under 18 U.S.C. § 16(b) in proceedings instituted in circuits that had not squarely addressed the issue. *Ramos*, 23 I. & N. Dec. at 347. Nevertheless, in cases arising in circuits that have addressed the issue, the Board has stated that it is bound to apply the law of the circuit. *Id.* at 346-47.

The result is disparate treatment of aliens among the courts of appeals, with the location of the removal proceeding determining the ultimate outcome. A stark example of the disparate treatment is presented by *Ursu v. INS*, 20 Fed. App. 702, 705, 2001 WL 1182409 at *2 (9th Cir. Oct. 5, 2001) (Pet. App. 16a-17a), in which the Ninth Circuit held that a conviction for DUI manslaughter under the Florida statute at issue in this case is not a crime of violence under 18 U.S.C. § 16. This decision is directly at odds with the Eleventh Circuit's position on the same Florida

statute in a case where death did not result from the DUI accident.

Petitioner was removed based on the aforementioned decisions by the BIA and the court of appeals that the Eleventh Circuit had decided that the DUI offense to which he pleaded guilty is a "crime of violence" under 18 U.S.C. § 16(a). To qualify as a "crime of violence" under § 16(a), an offense must have "as an element the use . . . of physical force against the person or property of another." 18 U.S.C. § 16(a) (2002). Although there is no precedent from this Court interpreting § 16 (either subsection (a) or (b)) in any context,[1] for the reasons set forth below, state statutes such as the Florida statute under which petitioner was convicted do not meet § 16(a)'s requirements.

First, the Florida statute does not require the intentional (or even reckless) application of physical force against another, and thus does not involve the "use of physical force against" another. Second, § 16(a) clearly provides that a "crime of violence" must involve some application of physical force against the person or property of another. State DUI laws, such as the Florida statute at issue in this case, that require the causation of injury for conviction but do not specify that they involve the use of physical force against another do not satisfy this

[1] In addition to being incorporated into the definition of "aggravated felony" in 8 U.S.C. § 1101(a)(43), the term "crime of violence" in § 16 is incorporated in numerous federal statutes unrelated to immigration. *See, e.g.*, 2 U.S.C. § 1961 (2002) (providing, among other things, that the Capitol Police may make "arrests within the District of Columbia for crimes of violence, as defined in section 16 of title 18, committed within the Capitol Buildings and Grounds . . . "); 18 U.S.C. § 931 (2002) prohibiting the possession of body armor by persons who have committed felony crimes of violence as defined by § 16); 18 U.S.C. § 1956 (2002) (outlawing the laundering of money that represents the proceeds of unlawful activities, including crimes of violence as defined in § 16).

requirement. Therefore, a conviction under Fla. Stat. § 316.193(3)(c)(2) (or other statutes that do not require the application of physical force against another) is not a "crime of violence" under 18 U.S.C. § 16(a).

In advancing these arguments, petitioner recognizes and appreciates the seriousness of DUI-related offenses. As the Seventh Circuit noted in *Bazan-Reyes v. INS*, 256 F.3d 600 (7th Cir. 2001), which involved a conviction for *homicide* involving DUI:

> Our decision [that DUI offenses, including homicide involving DUI, are not "crimes of violence"] does not minimize the seriousness of crimes involving drunk driving. There is no question that drunk driving exacts a high societal toll in the forms of death, injury and property damage. This fact does not, however, change our observation . . . that a drunk driving accident is not the result of plan, direction, or purpose, but of recklessness at worst and misfortune at best.

Id. at 612 (internal quotation marks and citations omitted).

A. A DUI With Serious Bodily Injury Offense That Does Not Require the Intentional Use of Force Against the Person or Property of Another is Not a Crime of Violence Under § 16(a)

State DUI statutes such as Fla. Stat. § 319.163(3)(c)(2) do not meet § 16(a)'s requirement that physical force be "used" against another's person or property. Specifically, any application of physical force that may be required for conviction under a state statute like Fla. Stat. § 319.163(3)(c)(2) is not "used" against the victim as that word is ordinarily and commonly understood. The word "use" means intentional availment, *United States v.*

Rutherford, 54 F.3d 370, 372-73 (7th Cir. 1995), *cert. denied*, 516 U.S. 924 (1995), or an intentional application of force, *United States v. Chapa-Garza*, 243 F.3d 921, 927 (5th Cir. 2001) *reh'g denied by* 262 F.3d 479 (5th Cir. 2001). Statutes such as Fla. Stat. § 319.163(3)(c)(2) do not require proof of the intentional application of force against other; rather, the unintentional, negligent and/or accidental application of force is sufficient.[2]

Petitioner was convicted of DUI with serious bodily injury under Fla. Stat. § 319.163(3)(c)(2), which includes a requirement of causation, but does not require the intentional, or even reckless, application of physical force against the person or property of another. It does not even require a showing of negligence as an element. See *State v. Hubbard*, 751 So. 2d 552, 564 (Fla. 1999) (no free-standing element of negligence separate and apart from the causation element). Therefore, because the everyday, commonsense meaning of the term "use" connotes intentional conduct, Fla. Stat. § 319.163(3)(c)(2) (and other state DUI statutes that do not require intentional application of force for conviction) are not "crimes of violence" under § 16(a); they do not involve the "use" of physical force against the person or property of another.

[2] As discussed in detail in Section I.B., *infra*, even if the Court were to conclude that the unintentional, accidental or negligent application of force satisfies § 16(a)'s "use against" requirement, Fla. Stat. § 316.193(3)(c)(2) still would not qualify as a "crime of violence" because the statute does not require *any* application of force (whether accidentally, negligently or intentionally) for conviction. Therefore, it does not have as "an element" any application of force against another, regardless of the *mens rea* this Court believes § 16 requires be associated with the force.

1. The Plain and Ordinary Meaning of "Use" Requires Intentional Application or Availment of Force

Interpreting the phrase "use . . . of physical force against," begins, of course, with the language of the statute. *Bailey v. United States*, 516 U.S. 137, 144 (1995) (interpreting the word "use," and noting that "[w]e start, as we must, with the language of the statute"). Because "use" is not defined by the statute, a court "normally construe[s] it in accord with its ordinary or natural meaning." *Smith v. United States*, 508 U.S. 223, 228 (1993). As set forth below, the "ordinary and plain meaning" of "use" includes intent. As a result, the phrase "use . . . of physical force against" includes specific intent by the actor to use force against the person or property of another.

Dictionary definitions confirm that "use" includes intent. For example, Black's Law Dictionary defines the verb "use" as "[t]o make use of; to convert to one's service; to employ; to avail oneself of; to carry out a purpose or action by means of; to put into action or service, especially to attain an end." *Black's Law Dictionary* 1541 (6th ed. 1990). Similarly, Webster's defines "use" to include "to employ for some purpose; put into service; make use of . . .to avail oneself of; apply to one's own purposes . . ." *Webster's Encyclopedic Unabridged Dictionary of the English Language* 1573-74 (Deluxe ed. 1994).[3] These definitions

[3] Other definitions of "use" include:

- "[t]o put into service or apply for a purpose; employ. . . [t]o avail oneself of; practice. . . [t]o seek or achieve an end by means of." The *American Heritage Dictionary of the English Language* 1894 (4th Ed. 2000); and
- "to put into action or service: avail oneself of: EMPLOY . . . to carry out a purpose or action by means of: UTILIZE . . . USE implies availing

highlight the intentional aspect of the verb "use." For example, because "use" means "to employ for some purpose," or "to carry out a purpose or action by means of," or "to put into action or service, especially to attain an end" it would not make sense to "use" something unintentionally or accidentally. Having a "purpose" or attaining "an end" entails having an intent to accomplish something; not something done accidentally or unintentionally. Although the car of a drunk driver who hits another may hit with force, the driver does not *use* force to achieve some purpose or attain some end. The definitions clarify the plain and ordinary meaning of "use" as including an intent and purpose. Accordingly, the phrase "use . . . of physical force against the person or property of another" requires the intentional application of force to achieve some purpose. Accidental, negligent or unintentional applications of force do not satisfy this definition.

The definition of "use" to mean intentional availment or application is consistent with this Court's analysis of the word in *Bailey* and *Smith*. Both cases involved the interpretation of the phrase "use of a firearm" in 18 U.S.C. § 924(c)(1). In *Smith*, the Court looked to various dictionary definitions of "use" and concluded that "use" includes intentionally employing a firearm by attempting to trade or barter it for drugs. 508 U.S. at 228-29. In doing so, the Court explained that "over 100 years ago we gave the word 'use' the same gloss, indicating that it means 'to employ' or 'to derive service from.'" *Id.* (quoting *Astor v. Merritt*, 111 U.S. 202, 213 (1884) (internal quotation marks omitted). Similarly, in *Bailey*, the Court concluded that "'use' impl[ies] action and implementation" and held that the government "must show active employment of [a] firearm"

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oneself of something as a means or instrument to an end." *Merriam-Webster Collegiate Dictionary* 1378 (11th Ed. 2003)

to establish a violation of § 924(c)(1). 516 U.S. at 144-45. In so doing, this Court in *Bailey* relied on *Smith*'s definitions of "use." *Id.* at 145.

Moreover, § 16(a) encompasses "threatened" and "attempted" use of force. 18 U.S.C. § 16(a). These terms, like "use" itself, necessarily require intent. *See Black's Law Dictionary* 127, 1480 (6th ed. 1990); *United States v. Vargas-Duran*, 356 F.3d 598, 603 (5th Cir. 2004) (en banc), *cert. denied*, 124 S.Ct. 1728 (2004) (holding that a sentencing guideline with the same "use . . . of physical force" language requires intentional application of force). As the Fifth Circuit observed in *Vargas-Duran*, interpreting the term "use" without an intent requirement would skew the meanings of the adjacent statutory terms, "attempted use" and "threatened use," both of which clearly are intentional acts:

> Were we to interpret "use of force" inconsistently with its plain meaning -- that is, as capable of being performed without intent -- we would effectively nullify the state of mind required by "attempted use" and "threatened use." For how could one intentionally attempt to unintentionally use force, or intentionally threaten to unintentionally use force?

356 F.3d at 603.

2. The Majority of Circuits That Have Interpreted "Use" Conclude That it Means Intentional Application or Availment of Force

The plain meaning of § 16(a) establishes that a crime of violence requires more than the accidental or negligent application of force against another. The majority of circuits that have considered whether intoxication offenses qualify as crimes of violence under § 16(a)'s "use . . . against" formulation (or under § 16(b)'s similar "use" requirement) have concluded they do not because an offense that has as an element the use, attempted use or threatened use of physical of force requires the intentional application of force against someone, not the mere accidental application of force that occurs in a DUI offense.

a. Section 16(a) Cases. The Seventh Circuit observed that the terminology of § 16(a) requiring the "use. . . . of physical force against" is not an apt description of drunk driving or its consequences. In *Rutherford*, the court explained that referring to drunk driving as a "use of force" would contort the plain meaning of the terms:

> Referring to a randomly occurring avalanche as a "use" of force would torture the English language. . . . A drunk driver who injures a pedestrian would not describe the incident by saying he "used" his car to hurt someone. In ordinary English, the word "use" implies intentional availment. No availment of force in order to achieve an end is present in a drunk driving accident.

54 F.3d at 372-73 (footnote omitted). Later in *Bazan-Reyes*, the Seventh Circuit held that even a conviction for DUI homicide does not satisfy § 16(a), because "the word 'use' requires volitional conduct" and "[a]lthough a conviction for

homicide by intoxicated use of a vehicle requires that the offender actually hit someone, it does not require that he *intentionally* used force to achieve that result." 256 F.3d at 609 (emphasis added). Thus, the court concluded that "our finding that the word 'use' requires volitional conduct prohibits a finding that drunk driving is a crime of violence under § 16(a)." *Id.*

In *Vargas-Duran*, the Fifth Circuit considered whether an individual convicted of intoxication assault under a Texas statute should receive a sentence enhancement under a provision of the Sentencing Guidelines that applies when the predicate offense involves "as an element the use, attempted use, or threatened use of physical force against the person of another." United States Sentencing Commission, *Guidelines Manual*, § 2L1.2 (2003) comment (n. 1(B)(iii)). This Sentencing Guideline uses the same operative language as the definition of a crime of violence under § 16(a). The underlying criminal offense required that the individual had caused serious bodily injury to another "by accident or mistake...while operating... [a] motor vehicle in a public place while intoxicated." Tex. Penal Code Ann. § 49.07 (1994). As with Fla. Stat. 316.193(3)(c)(2), the Texas statute at issue in *Vargas-Duran* required that serious bodily injury occur to another, but did not include a *mens rea* requirement.

The Fifth Circuit, en banc, agreed with Vargas-Duran's position that the sentencing enhancement applied only if the offense involved the intentional application of force, whereas the underlying criminal offense only required injury to another caused "by accident or mistake" and thus did not require as an element the intentional application of force. *Vargas-Duran*, 356 F.3d at 605. The court of appeals based its decision on the plain meaning of the word "use." Referring both to Black's Law Dictionary and general dictionaries of English usage including the Oxford English

Dictionary and Webster's, the court noted that definitions of the term "use" include the application or employment of something for a purpose or to achieve an end. *Id.* at 602-03. The mere application of force against the person of another does not necessarily mean that the application was intentional, and the court concluded that the "use of force" requires intent. "Because we conclude that the meaning of 'use of force' is free of ambiguity, we therefore hold that the plain meaning of the word 'use' requires intent." *Id.* at 603.[4]

b. Section 16(b) cases. As noted, petitioner was removed based on the court of appeals' conclusion that his offense constituted a crime of violence under § 16(a). Given the similarity of the critical language between §16(a) and §16(b), however, decisions addressing whether § 16(b) applies to DUI offenses further support an interpretation of the term "use" in a way that applies to offenses involving the intentional application of force, but not to those that involve accidental or negligent application of force. *See Commissioner v. Lundy*, 516 U.S. 235, 250 (1996) ("The interrelationship and close proximity of these provisions of the statute presents a classic case for application of the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.") (quoting *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (quoting *Sorensen v. Secretary of the Treasury*, 475 U.S. 851, 860 (1986))) (internal quotations omitted); *Commissioner v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 159 (1993).

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[4] The Ninth Circuit also concluded that DUI causing injury to another under California law is not a "crime of violence" under § 16(a) or § 16(b), but it did not interpret the word "use" to require intent. *United States v. Trinidad-Aquino*, 259 F.3d 1140, 1145 (9th Cir. 2001). Rather, the court interpreted "use" to require "volitional" conduct, with a *mens rea* of at least recklessness. Petitioner's offense would not constitute a "crime of violence" even using the Ninth Circuit's lower standard because it does not even require a *mens rea* of negligence.

By its terms, § 16(b) may apply to a broader range of conduct than §16(a).[5] However, both subsections contain the same language that is critical to determining whether offenses that involve the unintentional or accidental application of force against another qualify as "crimes of violence." Section 16(a) requires that an offense have "as an element the use . . . of physical force against the person or property of another," and § 16(b) requires that an offense "involve[] a substantial risk that physical force against the person or property of another may be used. . . ." Both subsections contain the "use of physical force against . . . another" formulation that supports the conclusion that offenses without a *mens rea* of intent do not constitute "crimes of violence." *See Bazan-Reyes*, 256 F.3d at 608-12 (treating "use" the same under both § 16(a) and § 16(b) and holding that DUI homicide is not a "crime of violence" under either subsection); *see also Ramos*, 23 I & N Dec. at 346 (stating that the majority of courts addressing the issue have "declined to differentiate between the terms 'use' and 'may be used,'" for purposes of § 16(a) and § 16(b), respectively). As concurring Board members Pauley and Scialabba recognized in *Ramos*, because both § 16(a) and § 16(b) require the "use[]" of "physical force" for a conviction to qualify as a "crime of violence," "it would be a strange jurisprudence to find that Congress intended a different meaning for the same words in the two [subsections]" of § 16. *Id.* at 350 n.2 (Pauley, concurring, joined by Scialabba). Because "use" should be interpreted similarly to require intent in § 16(a) and § 16(b), petitioner's conviction does not qualify as a "crime of violence" under either subsection of § 16 because his offense did not require

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[5] The broader applicability of § 16(b) stems, in large part, from the fact that the "use of physical force" must be "an element" of an offense to qualify under § 16(a), whereas § 16(b) only requires that the offense, "by its nature, involves a substantial risk" that "physical force . . . may be used in the course of committing the offense."

(or present a substantial risk) that he intentionally apply force against the car accident victims.

Courts considering DUI and other offenses that involve injury or death have understandably reached the conclusion that such offenses are not "crimes of violence" under § 16(b) because they do not involve risk that physical force may be *intentionally* (or at least recklessly) used against another. *See, e.g., Jobson v. Ashcroft*, 326 F.3d 367, 374 (2d Cir. 2003) (second degree manslaughter for recklessly causing the death of another is not a crime of violence under § 16(b)); *Bazan-Reyes*, 256 F.3d at 611 (holding that DUI *homicide* is not a "crime of violence" under either § 16(a) or § 16(b) and noting that "the language of § 16(b) simply does not support a finding that a risk that one object will apply force to another is enough to constitute a crime of violence . . . § 16(b) only applies when the nature of an offense is such that there is a substantial likelihood that the perpetrator will *intentionally* employ physical force against another's person or property." (internal quotation omitted and emphasis added)); *Trinidad-Aquino*, 259 F.3d at 1145-46 (holding that DUI with serious bodily injury is not a "crime of violence" under § 16(a) or § 16(b) but adopting a recklessness *mens rea* standard); *but see Omar v. INS*, 298 F.3d 710, 715-18 (8th Cir. 2002).[6]

[6] In *Omar*, the Eighth Circuit held that a conviction for vehicular homicide under Minnesota law constituted a crime of violence under § 16(b). 298 F.3d at 720. The court discussed whether "use" requires intentional application of force (and concluded it did not), but it conducted no statutory analysis of the word "use" and, instead, focused on the risk of harm inherent in DUI offenses. By focusing on the fact that criminal vehicular homicide "always result[s] in another's death," (in *Omar*, unlike this case, two people died), the court improperly "equate[d] the phrase 'risk that physical force may be used' with language Congress did not employ in § 16(b), 'risk that injury may occur.'" *Id.* at 722 (Heaney, C.J., dissenting).

Similarly, the Sixth Circuit has held that DUI homicide is a "crime of violence" under § 16(a) and § 16(b) and the Tenth Circuit has held that

In *Jobson*, the Second Circuit relied on its previous holding in *Dalton v. Ashcroft*, 257 F.3d 200 (2d Cir. 2001), and reinforced its view "that the verb 'use' in section 16(b), particularly when modified by the phrase 'in the course of committing the offense,' suggests that section 16(b) contemplates only intentional conduct and refers only to those offenses in which there is a substantial likelihood that the perpetrator will intentionally employ force." 326 F.3d at 373 (citations and internal quotations omitted). The court concluded that:

> a defendant must, in pursuing his intended criminal activity, risk having to *intentionally use force* to commit the offense. By contrast, a defendant who is convicted of second-degree manslaughter, like other offenses of pure recklessness, may lack any "intent, desire, or willingness to use force or cause harm at all."

Id. at 374 (quoting *United States v. Parson*, 955 F.2d 858, 866 (3d Cir. 1992)) (emphasis added).

Courts have also focused on the plain meaning of "use" as requiring intent in ruling that DUI offenses not involving injury do not satisfy § 16(b). *Dalton*, 257 F.3d at 206-07; *United States v. Chapa-Garza*, 243 F.3d 921, 926-27 (5th Cir. 2001), *reh'g denied by* 262 F.3d 479 (5th Cir. 2001); *see also United States v. Lucio-Lucio*, 347 F.3d 1202, 1204-07 (10th Cir. 2003) (not focusing on the word "use," but

DUI is a "crime of violence" under § 16(b). *Tapia-Garcia v. INS*, 237 F.3d 1216 (10th Cir. 2001); *United States v. Santana-Garcia*, 211 F.3d 1271, 2000 WL 491510 (6th Cir. Apr. 18, 2000) (unpublished table decision). As with the Eleventh Circuit's decision in *Le*, neither court engaged in any statutory construction involving the interpretation of the "use against" formulation. Instead, both courts improperly focused on the "risk of physical injury" standard found in other statutes (but not § 16) rather than § 16's "use of physical force" standard.

considering the plain meaning of all of § 16(b), as well as § 16's legislative history, to conclude that DUI does not satisfy § 16(b) because it does not involve intentional acts of violence). *But see Ramos*, 23 I. & N. Dec. at 345 (announcing that DUI will not be considered a "crime of violence" under § 16(b) unless the offense has a *mens rea* of at least recklessness).

In *Chapa-Garza*, for example, the Fifth Circuit focused on the dictionary definition of the verb "use," and noted that the definitions "indicate that 'use' refers to volitional, purposeful, not accidental, employment of whatever is being 'used.'" 243 F.3d at 926. It rightly concluded that "[t]he criterion that the defendant use physical force against the person or property of another is most reasonably read to refer to intentional conduct, not an accidental unintended event." *Id.* The court made the important distinction between the application of force and the resulting injury:

> While the victim of a drunk driver may sustain physical injury from physical force being applied to his body as a result of collision with the drunk driver's errant automobile, it is clear that such force has not been intentionally "used" against the other person by the drunk driver at all. . . .

Id. at 927. Section 16(b) applies, the court concluded, when there is a "substantial likelihood that the offender will intentionally employ physical force against the person or property of another in order to effectuate the commission of the offense." *Id.* at 926.

Similarly, the Second Circuit in *Dalton* concluded that DUI does not satisfy §16(b). In doing so, *Dalton* confirmed the commonsense, everyday understanding that although accidents involve force they do not include the "use" of force:

> [T]he language of § 16(b) fails to capture the nature of the risk inherent in drunk driving. This risk is, notoriously, the risk of an ensuing accident; it is not the risk that the driver will "use physical force" in the course of driving the vehicle... [A]n accident, by definition, is something that is neither planned nor foreseen -- except perhaps in hindsight. Although an accident may properly be said to involve force, one cannot be said to use force in an accident as one might use force to pry open a heavy, jammed door.

257 F.3d at 206.

These cases interpreting the substantially similar operative language of § 16(b) support the conclusion that the plain meaning of the phrase "use . . . of physical force against" in § 16(a) requires that the elements of the offense include the intentional application of force against the person of property of another. An unintentional or accidental application of force does not suffice for a crime of violence.

Petitioner's offense, like, for example, those at issue in *Bazan-Reyes* and *Vargas-Duran*, does not have as "an element" the intentional application of force. Indeed, it has no *mens rea* requirement at all. *Hubbard*, 751 So. 2d at 564. Rather, it simply requires a causal connection between the offender's intoxicated use of a vehicle and bodily injury to another. Because the "use of physical force against another" required by § 16(a) does require that the use of force is intentional, petitioner's offense under Fla. Stat, § 316.193 cannot be considered a crime of violence under § 16(a).

B. A DUI With Serious Bodily Injury Offense Does Not Necessarily Have as "An Element" the Use, Attempted Use or Threatened Use of Physical Force Against the Person or Property of Another.

1. The Eleventh Circuit in *Le*, and by Extension in this Case, Improperly Assumed that a Crime That Has an Element of "Causation of Physical Injury" Implicitly Has an Element of "Use of Physical Force."

An offense that has an element of "causing injury" to another does not necessarily require proof that physical force was applied to cause such injury. Therefore, offenses such as Fla. Stat. § 319.163(3)(c)(2), which require the causation of injury to another, but do not have as an element the application of any force (accidentally, negligently, intentionally or otherwise) against the person of another, are not crimes of violence under § 16(a).

The court of appeals concluded that petitioner had been convicted of an aggravated felony based on another panel's earlier decision in *Le*. J.A. 115-17. The Eleventh Circuit's determination that DUI with serious bodily injury under Fla. Stat. § 316.193(3)(c)(2) has "as an element" the use of physical force against another did not properly reflect the Florida statute's requirements. The plain meaning of "an element" of an offense, combined with the statutory elements of the Fla. Stat. § 316.193(3)(c)(2), demonstrate that the application of force (whether intentional or not) was not a required element for petitioner's conviction.

The court of appeals in *Le* affirmed the reasonableness of the Board's conclusion that a conviction for DUI with serious bodily injury is a crime of violence under 18 U.S.C. § 16(a). *Le v. Attorney General*, 196 F.3d

1352, 1354 (11th Cir. 1999) (per curiam). It did so because, in the court of appeals' view, the use of force is an element under Fla. Stat. § 316.193(3). *Id.* The court observed that there are two elements to the offense under Florida law: (1) the defendant operated a vehicle while under the influence; and (2) as a result of such operation he caused serious bodily injury to another. *Id.* It then concluded, without explanation, that the Florida statute meets the definition of a crime of violence under § 16(a), because serious bodily injury is an element of offense. *Id.*

In reaching its decision, the court of appeals did not refer to the language of § 16(a) which requires that the offense "has as an element the use, attempted use or threatened use of physical force against the person or property of another" in order to qualify as a "crime of violence." Rather, the court observed that "*serious bodily injury is included as an element of this offense.* Consequently, Mr. Le's conviction for driving under the influence with serious bodily injury satisfies the definition of a crime of violence under section 16(a) of Title 18 *because one element includes the actual use of physical force.*" *Le*, 196 F.3d at 1354 (emphasis added).

This conclusion misses the distinction that the occurrence of serious bodily injury is not a criterion of a crime of violence under 18 U.S.C. § 16(a), but the "use of physical force against . . . another" is. The conclusion appears to rest on an erroneous assumption that any crime that requires proof of "serious bodily injury" necessarily involves the "use of physical force."

2. Fla. Stat. § 316.193(3)(c)(2) Requires Proof of Causing Serious Bodily Injury to Another, But Does Not Require Proof of the Use of Physical Force

The plain language of Fla. Stat. § 316.193(3)(c)(2) provides that causing serious bodily injury is an essential element of the offense, but that is not the relevant inquiry under 18 U.S.C. § 16(a). The relevant inquiry is whether the offense "has as an element the use, attempted use, or threatened use of physical force against the person or property of another[.]" Against the correct standard, the plain language of the statute indicates that the Florida DUI offense does not have the requisite element for a crime of violence under § 16(a). The text of § 316.193(3)(c)(2) makes clear that the "use . . . of physical force against the person or property of another" required by § 16(a) is not an element of the offense.

The elements of a crime are "those constituent parts of a crime that must be proved by the prosecution to sustain a conviction." *Black's Law Dictionary* 520 (6th ed. 1990). Rather than considering the circumstances that resulted in the conviction in a particular case, the elements of an offense are the minimum that must be proved to support a conviction. Thus the use of physical force against the person or property of another is an element of the offense if it is legally required in order to obtain a conviction under the Florida DUI statute. *See, e.g. Flores v. Ashcroft*, 350 F.3d 666, 672 (7th Cir. 2003) (classification of state criminal offense for purposes of § 16(a) begins and ends with the elements of the crime); *Chrzanoski v. Ashcroft*, 327 F.3d 188, 192 (2d Cir. 2003) ("An element of a crime is a fact that must be proven beyond a reasonable doubt to obtain a conviction."); *see also Francis v. Reno*, 269 F.3d 162, 168 (3d Cir. 2001) ("§ 16(a) is narrowly drawn to include only crimes whose elements require the use, attempted use, or

threatened use of physical force"); *United States v. Gonzalez-Lopez*, 911 F.2d 542, 546-47 (11th Cir. 1990) (analysis of a crime under § 16(a) is a legal rather than a factual inquiry which should focus on the statute that defines the offense rather than the particular conduct of the defendant). As discussed below, proof that a defendant "used physical force against the person or property of another" is not required for conviction under Fla. Stat. 316.193(3)(c)(2).

In *Dalton*, the Second Circuit reviewed an order of removal based on a DUI conviction under a New York statute. In considering whether the DUI offense constituted a crime of violence under 18 U.S.C. § 16(b) the court stated:

> [I]n the context of driving a vehicle, it is unclear what constitutes the "use of physical force." The physical force used cannot reasonably be interpreted as a foot on the accelerator or a hand on the steering wheel. Otherwise, all driving would, by definition, involve the use of force, and it is hard to believe that Congress intended for all felonies that involve driving to be "crimes of violence."

257 F.3d at 206.

The enumerated subsections of Fla. Stat. § 316.193(3)(c) do not require that the person charged with the offense "use[d], attempted [to] use, or threatened [to] use . . . physical force against the person or property of another." Accordingly, in order to obtain a conviction for DUI with serious bodily injury, a Florida prosecutor need not specifically prove that an individual charged with DUI with serious bodily injury used, attempted to use or threatened to use physical force against another. The court of appeals in *Le*, and by extension in this case, ignored the plain meaning of an "element" and apparently assumed that any physical

injury must be caused by the use of physical force and that serious bodily injury cannot occur without the "use . . . of physical force against the person or property of another." *Le,* 196 F.3d at 1354 (concluding that because "serious bodily injury" is an element of the Florida offense, the offense also includes an element of "the actual use of force."). In doing so, the Eleventh Circuit improperly substituted a *consequence* of the use of force (serious bodily injury), for § 16(a)'s requirement that the offense "has as an element" the use of force against another. This position incorrectly assumes that "causation of injury" must always include the "use of force," and should be rejected.

Even if a typical DUI with injury charge may follow an accident involving an intoxicated driver whose vehicle hits another vehicle, the required elements of such an offense do not necessarily involve that scenario. In fact, other plausible situations exist where physical injury is caused by the operation of a vehicle by an intoxicated driver, without the use of any physical force whatsoever by the intoxicated driver. Judge Clement of the Fifth Circuit highlighted some of these possibilities in her dissent from the original Fifth Circuit panel opinion in *Vargas-Duran*. In discussing how a Texas intoxication assault statute (which, like Fla. Stat. § 316.193(3)(c)(2), only required intoxication, operation of a motor vehicle and causation of serious bodily injury for conviction) could be violated without any application of force whatsoever, Judge Clement observed:

> For instance, if a drunk driver swerves off the road, causing a pedestrian to dive into a ditch and become seriously injured, the Texas statute is doubtlessly violated, even though there has been no actual application of force to anyone. Consider also the case where a drunk driver's near miss causes a heart attack.

United States v. Vargas-Duran, 319 F.3d 194, 204 (Clement, J., dissenting), *vacated by* 356 F.3d 598 (5th Cir. 2004);[7] *see also Chrzanoski,* 327 F.3d at 195 (individual guilty of third degree assault under Connecticut statute that requires intent to cause physical injury, did not commit a crime of violence under § 16(a) because intentional causation of injury does not necessarily involve the use of force; noting that "[g]iven the elements of [the Connecticut statute], it seems an individual could be convicted for intentional assault . . . for injury caused not by physical force, but by guile, deception or even deliberate omission").

Causing injury without applying any physical force is more than a mere possibility under various state laws, including Florida's. *See, e.g., Barrington v. State*, 145 Fla. 61, 65-66 (1940) (upholding conviction for DUI manslaughter prior to codification of Fla. Stat. § 316.193(3), where the victim's car ran into the intoxicated defendant's parked car, which the defendant had stopped in the right lane of a highway and which was not moving at the time of the accident). The *Barrington* case exemplifies the difference between causing serious bodily injury and using physical force against the person or property of another. The defendant caused serious injury to the passenger of another car (resulting in death) by the operation of his vehicle while intoxicated, but without using physical force against that

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[7] Judge Clement wrote the majority opinion in the en banc *Vargas-Duran* decision where she reiterated that:

> the fact that the statute requires that serious bodily injury result from the operation of a motor vehicle by an intoxicated person does not mean that the statute requires that the defendant have used the force that caused the injury. . . . There is . . . a difference between a defendant's causation of injury and the defendant's use of force.

356 F.3d at 606.

person. Although the case did not discuss the statutory offense in this case, the elements of Fla. Stat. § 316.193(3)(c)(2) clearly would have been satisfied. That offense would not qualify as a crime of violence under § 16(a), however, because the defendant did not use, threaten to use, or attempt to use physical force against the person who died in the accident.

3. Cases Interpreting 18 U.S.C. § 16(b) Reinforce That "Causing Serious Bodily Injury" is Different Than "Using Physical Force"

Although the Eleventh Circuit deemed petitioner's underlying offense a crime of violence only under § 16(a), case law applying § 16(b) reinforces the conclusion that an offense that has an element the causation of physical injury (such as Fla. Stat. § 316.193(3)(c)), does not necessarily also have as an element, implicitly or by definition, "the use . . . of physical force against the person or property of another." These cases delineate the important distinction between causing injury and using force.

In concluding that DUI and other offenses (with or without resulting injury) do not qualify as "crimes of violence" under § 16(b), courts of appeals have compared the language of § 16(b) with the provision of one of the Sentencing Guidelines, USSG § 4B1.2(a)(2), which provides for a sixteen-level enhancement if the defendant has been convicted of a "crime of violence."[8] These cases do not address the "force as an element" requirement, but the

[8] Prior to November 1, 1989, the guideline and § 16 were identical because the guideline simply incorporated by reference the definition of "crime of violence" in § 16. United States Sentencing Commission, *Guidelines Manual* § 4B1.2(1) (1988). The guideline was amended effective November 1, 1989 to provide its own definition. USSG § 4B1.2(1) (1989).

distinction they draw between § 16(b) and USSG § 4B1.2(a)(2) highlights the distinction between the use of force, and the causation of injury. *See Jobson*, 326 F.3d at 373 n.5; *Dalton*, 257 F.3d at 207-08; *Bazan-Reyes*, 256 F.3d at 607-611; *Chapa-Garza*, 243 F.3d at 924-26; *cf. United States v. Parson*, 955 F.2d 858, 864-66 (3d Cir. 1992) (interpreting § 4B1.2(1) of the Sentencing Guidelines and contrasting its "risk of injury" language with, among other things, § 16(b)'s "risk of physical force" language). The guideline provides that:

> The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that (1) has an element the use, attempted use, or threatened use of physical force against the person of another, or (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or *otherwise involves conduct that presents a serious potential risk of physical injury to another.*[9]

USSG § 4B1.2(a) (emphasis added).

The language of USSG § 4B1.2(a)(1) is almost identical to § 16(a), but the second part of the guideline differs substantively from § 16(b). Section 16(b) covers offenses that "involve[] a substantial risk that physical force against the person or property of another may be used . . . ," whereas the enhancement provided by § 4B1.2(a)(2) covers offenses that "otherwise involve[] conduct that present[] a serious potential risk of physical injury to another." Courts have noted the important distinction between "risk that

[9] Sentencing guideline § 4B1 was renumbered in 1997. *See* USSG App. C at 416 (1997). Section 4B1.2(a)(1) used to be § 4B1.2(1)(i) and § 4B1.2(a)(2) used to be § 4B1.2(1)(ii). The cases refer to both versions of this guideline.

physical force may be used" and the "risk of physical injury" in applying § 16(b).[10] This established and commonsense distinction between conduct and effect explains why DUI with serious bodily injury under Fla. Stat. § 316.193(3)(c)(2) (and other state DUI statutes that only require causation of injury for conviction) are not "crimes of violence" under § 16(a) because they do not have as "an element" the "use of physical force," although they do have as an element a specific effect, *i.e.*, serious bodily injury.

The importance of recognizing the distinction between the "risk of physical injury" in the guideline and the "risk that physical force may be used" is highlighted by the

[10] *See, e.g.*, *Dalton*, 257 F.3d at 207-08 (holding that DUI is not a "crime of violence" under § 16(b), rejecting the government's argument that "the difference, if any, between a 'risk of injury' and a risk of the 'use of physical force' is negligible" and concluding that the Sentencing Commission broadened the definition of "crime of violence" by revising the guideline to refer to "risk of injury"); *Bazan-Reyes*, 256 F.3d at 609-11 (rejecting the government's argument that § 16(b) and guideline 4B1.2(a)(2) should be interpreted similarly because "[t]he combination of the phrases 'physical force,' 'may be used,' and 'in the course of committing the offense' . . . is a material difference between the two definitions that requires § 16(b) to be interpreted to exclude felony DWI [including DWI resulting in death] from the definition of crime of violence."); *Chapa-Garza*, 243 F.3d at 925 (rejecting a government argument similar to that presented in *Dalton* and noting that guideline § 4B1.2(a)(2)'s "'otherwise' clause concerns only the risk of one particular effect (physical injury to another's person or property) of the defendant's conduct. Section 16(b) is focused on the defendant's conduct itself, as there is no requirement that there be a substantial risk that another's person or property will sustain injury"); *see also Lucio-Lucio*, 347 F.3d at 1207; *Parson*, 955 F.2d at 865-66 (analyzing the sentencing guideline, but contrasting it with § 16(b)). Each of these cases involves a comparison of § 16(b) to § 4B1.2(a)(2) of the Sentencing Guidelines. Of course, both of these subsections are framed in terms of offenses that involve "substantial risk" of either physical injury or use of physical force. However, because § 16(a) also contains the "use of physical force" requirement, the contrast drawn in these cases between causing injury and using force applies equally to that section.

fact that courts other than *Le* that have ruled that DUI offenses (those with or without injury or death) are crimes of violence under § 16 have failed to make this important distinction. *See Tapia Garcia v. INS*, 237 F.3d 1216 (10th Cir. 2001); *United States v. Santana-Garcia*, 211 F.3d 1271, 2000 WL 491510 (6th Cir. Apr. 18, 2000) (unpublished table decision) (Pet. App. 5a-12a).[11]

In *Tapia-Garcia*, the Tenth Circuit held that DUI satisfies § 16(b). In doing so, the court focused on the risk of injury inherent in DUI offenses, and relied on cases applying the Sentencing Guidelines' "risk of physical injury" standard and the erroneous premise that "the language of [this] Guideline provision, USSG § 4B1.2, is similar to that of 18 U.S.C. § 16(b)." 237 F.3d at 1222. Similarly, the Sixth Circuit concluded that DUI resulting in the death of another under Indiana law qualified as a crime of violence under both § 16(a) and § 16(b). *Santana-Garcia*, 211 F.3d 1271, 2000 WL 491510 at *2-3 (Pet. App. 8a-10a). The court conducted no analysis of § 16's "use against" formulation. Instead, the court relied on cases that held that vehicular manslaughter and/or DUI offenses qualified as either "crimes of violence" under § 4B1.2(a)(ii) of the Sentencing Guidelines or "violent felonies" under 18 U.S.C. § 924(e)(2)(B)(ii), provisions that only require a substantial risk of injury to others, not the use of force against others. *Id.*[12]

[11] As explained in footnote 6, *supra*, the court in *Omar* concluded that "use" does not require intent without conducting any statutory construction of the word "use" and by inappropriately equating "use of force" with "risk of injury."

[12] Four of the cases cited in *Santana-Garcia* relied on § 4B1.2(1)(ii) in concluding that the offense in question was a crime of violence. The fifth case applied § 924(e)(2)(B)(ii) which defines "violent felony" with the same definition used for "crime of violence" in § 4B1.2(a)(ii) of the Sentencing Guidelines.

For the reasons set forth above, even though the offense of DUI with serious bodily injury under Fla. Stat. § 316.193(3)(c)(2) explicitly has "as an element" that the offender *causes injury* to another, it does not have "as an element" a requirement that physical force be "*used*" "against the person . . . of another."

II. CONGRESS ADDED "CRIMES OF VIOLENCE" TO THE LIST OF AGGRAVATED FELONIES WITHIN A STATUTORY FRAMEWORK THAT DISTINGUISHED DUI OFFENSES INVOLVING INJURY FROM "CRIMES OF VIOLENCE"

The structure of § 101 of the INA also demonstrates that "crimes of violence" do not include DUI offenses (including those that result in injury to others). 8 U.S.C. § 1101 (2002). As noted previously, § 101(A)(43) of the INA (8 U.S.C. § 1101(a)(43)) lists the "aggravated felonies" for which an alien can be deported and provides that one of them is a "crime of violence" as defined in 18 U.S.C. § 16. Another subsection of § 1101 lists the "serious criminal offenses" that can render inadmissible an alien who has asserted diplomatic immunity to prosecution for such an offense. 8 U.S.C. § 1101(h). In February 1990, Congress passed the Foreign Relations Authorization Act which specifies the disqualifying "serious criminal offenses" in § 1101(h). Pub. L. No. 101-246 § 131, 104 Stat. 15, 31 (1990). That provision lists, as separate offenses, "crimes of violence" as defined in 18 U.S.C. § 16 and crimes of DUI resulting in injury to another person:

> For purposes of section 1182(a)(2)(E) of this title, the term "serious criminal offense" means--

> (1) any felony;
>
> (2) any crime of violence, as defined in section 16 of Title 18; or
>
> (3) any crime of reckless driving or of driving while intoxicated or under the influence of alcohol or of prohibited substances if such crime involves personal injury to another.

8 U.S.C. § 1101(h).

This listing of both "crimes of violence" and DUI resulting in injury in the same provision is critical. Because courts have the duty "to give effect, if possible, to every clause and word of a statute," *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (citations omitted), and Congress is presumed not to include superfluous words in statutory text, the text of § 1101(h) demonstrates that, as of February 1990, Congress believed that DUI offenses that cause injury are not within "crimes of violence" defined in 18 U.S.C. § 16.[13]

Moreover, at the time § 1101(h) was enacted, the definition of aggravated felony did not include a reference to "crimes of violence" as defined in 18 U.S.C. § 16. It was not until nine months after the enactment of § 1101(h), which distinguishes DUI offenses involving injury from "crimes of violence" defined in § 16, that Congress amended the definition of aggravated felonies in § 1101(a)(43) to incorporate "crimes of violence" as defined by § 16 in § 1101(a)(43)(F). Immigration Act of 1990, Pub. L. No.

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[13] Congress' differentiation between "crimes of violence" and DUI offenses appears elsewhere. For example, 22 U.S.C. § 2728 (2002), which sets forth reporting requirements to Congress for crimes committed by diplomats, includes in its list of crimes that must be reported both "crimes of violence" as defined by § 16 and driving under the influence. This separate enumeration further illustrates that Congress understood that DUI offenses are not included in § 16.

101-649, § 501, 104 Stat. 4978, 5048 (1990). It is assumed that Congress is aware of existing law when it passes legislation. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988). Therefore, it must be presumed that Congress knew when it added § 1101(a)(43)(F) that DUI offenses were included affirmatively and separately from "crimes of violence" and are not subsumed within the term "crimes of violence."

The addition of § 1101(a)(43)(F) after the enactment of § 1101(h) demonstrates that Congress did not believe that DUI offenses (whether they include injury to others or not) were included within § 1101(a)(43)(F) by way of the incorporation of 18 U.S.C. § 16's definition of "crime of violence." This fact further buttresses the conclusion that is firmly established by § 16's plain meaning.

CONCLUSION

The order of the court of appeals should be vacated and the court of appeals should be directed to exercise jurisdiction over the petition for review and vacate the removal order against petitioner.

Respectfully submitted,

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RELEVANT STATUTORY PROVISIONS

The following statutory provisions are involved in this case.

1. Section 16 of Title 18 of the United States Code defines "crime of violence," and it provides:

> The term "crime of violence" means --
>
> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 16.

2. Section 101 of the INA defines the terms "serious criminal offense" and "aggravated felony," conviction for which makes an alien removable. Section 101 provides in pertinent part:

> (a) As used in this chapter--
>
> * * *
>
> (43) The term "aggravated felony" means--
>
> * * *
>
> (F) a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment at least one year;
>
> * * *

(h) For purposes of section 1182(a)(2)(E) of this title, the term "serious criminal offense" means--

(1) any felony;

(2) any crime of violence, as defined in section 16 of Title 18; or

(3) any crime of reckless driving or of driving while intoxicated or under the influence of alcohol or of prohibited substances if such crime involves personal injury to another.

8 U.S.C. § 1101(a)(43)(F);(h).

3. Section 1182 of Title 8 of the United States Code provides in pertinent part:

(a) Classes of aliens ineligible for visas or admission
Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

* * *

(2) Criminal and related grounds

* * *

(E) Certain aliens involved in serious criminal activity who have asserted immunity from prosecution

Any alien--
(i) who has committed in the United States at any time a serious criminal offense (as defined in section 1101(h) of this title),

(ii) for whom immunity from criminal jurisdiction was exercised with respect to that offense,

(iii) who as a consequence of the offense and exercise of immunity has departed from the United States, and

(iv) who has not subsequently submitted fully to the jurisdiction of the court in the United States having jurisdiction with respect to that offense,

is inadmissible.

8 U.S.C. § 1182(a)(2)(E).

4. Section 4B1.2 of the Federal Sentencing Guidelines reads:

(a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that --

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

USSG § 4B1.2.

5. Petitioner was convicted under Fla. Stat. § 316.193(3)(c)(2), which provides, in pertinent part:

> (1) A person is guilty of the offense of driving under the influence and is subject to punishment as provided in subsection (2) if the person is driving or in actual physical control of a vehicle within this state and:
>
> > (a) The person is under the influence of alcoholic beverages, any chemical substance set forth in s. 877.111, or any substance controlled under chapter 893, when affected to the extent that the person's normal faculties are impaired;
> >
> > (b) The person has a blood-alcohol level of 0.08 or more grams of alcohol per 100 milliliters of blood; or
> >
> > (c) The person has a breath-alcohol level of 0.08 or more grams of alcohol per 210 liters of breath.
>
> * * *
>
> (3) Any person:
>
> (a) Who is in violation of subsection (1);
>
> (b) Who operates a vehicle; and
>
> (c) Who, by reason of such operation, causes:
>
> * * *
>
> > 2. Serious bodily injury to another, as defined in s. 316.193, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Fla. Stat. § 316.193.

United States Court of Appeals, Sixth Circuit.
UNITED STATES OF AMERICA Plaintiff-Appellee,
v.
Ismael SANTANA-GARCIA Defendant-Appellant.
No. 98-2234.
April 18, 2000.

On Appeal from the United States District Court for the Western District of Michigan.

Before BOGGS and COLE, Circuit Judges, and ZATKOFF,* District Judge.

ZATKOFF, Chief District Judge.

***1** Ismael Santana-Garcia, a federal prisoner, appeals his sentence pursuant to 28 U.S.C. § 1291 (1993). Santana-Garcia was sentenced to ninety-two months imprisonment to be followed by thirty-six months of supervised release and a fine of $1500.00 after pleading guilty to reentry by a deported alien contrary to 8 U.S.C. § 1326 (1999). For the reasons stated below, we affirm Santana-Garcia's sentence.

I.

On August 11, 1994, while in the State of Indiana, defendant was involved in an automobile collision that resulted in the death of an elderly man. Defendant was operating the automobile with a blood alcohol level of .284 percent. On December 20, 1994, he was sentenced to six years incarceration, with two years suspended by an Indiana state court judge. Defendant was incarcerated at the Indiana State Farm in Greencastle from January 3, 1995 until

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* The Honorable Lawrence P. Zatkoff, United States Chief District Judge for the Eastern District of Michigan, sitting by designation.

September 17, 1996. Upon defendant's release from prison, deportation proceedings were initiated and he was deported by the INS on September 30, 1996. In October 1996, defendant illegally re-entered the United States and returned to Indiana.

On March 3, 1998, defendant was arrested by the Niles, Michigan Police Department and charged with operating a motor vehicle while under the influence of intoxicating liquor-second offense. It was later determined by the Niles Police Department that defendant was illegally present in this country. On June 1, 1998, a Complaint and Arrest Warrant were filed charging defendant with reentry by a deported alien contrary to 8 U.S.C. § 1326 (1999). On June 2, 1998, defendant was arraigned before a magistrate judge and was ordered detained pending a preliminary examination and detention hearing. On June 4, 1998, defendant waived the preliminary examination and detention hearing and was ordered held pending trial. On June 10, 1998, a one-count indictment was filed charging defendant with reentry by a deported alien contrary to 8 U.S.C. § 1326 (1999).

On July 7, 1998, defendant was arraigned on the indictment and pled guilty before a magistrate judge. On October 28, 1998, defendant appeared before the district judge, who accepted defendant's plea and held a sentencing hearing. Pursuant to U.S. Sentencing Guidelines Manual § 2L1.2(b)(1)(A) (1998), the district court enhanced defendant's offense level by sixteen levels because defendant had been deported after a conviction for an aggravated felony. The district court reasoned that:

> Under section 2L1.2 of the guidelines, "aggravated felonies" include crimes listed under Title 8, United States Code, section 1101(a)(43). Since felony crimes of violence, as listed under 1101(a)(43) and [sic] since the *Farnsworth* Court[1] determined that negligent manslaughter caused by drunken driving was a felony crime of violence, the Court determines that the defendant ... has committed an aggravated felony and should receive the enhancement.

JA at 67-68 (footnote added). Thus, the district court found that operating a motor vehicle while intoxicated that resulted in the death of another person was an aggravated felony.

***2** Next, the district court declined to grant defendant a reduction for acceptance of responsibility because it determined that defendant had not demonstrated an affirmative acceptance of responsibility for his conduct. Therefore, the district court sentenced defendant to ninety-two months imprisonment to be followed by thirty-six months of supervised release and a fine of $1500.00.

II.

There are two issues presented on appeal before the Court. First, whether the District Court erred in determining that defendant's prior conviction for operating a motor vehicle while intoxicated resulting in the death of another person contrary to Indiana law was an aggravated felony under U.S.S.G. § 2L1.2. Second, whether the District Court erred when it denied defendant a reduction for acceptance of responsibility under U.S.S.G. § 3E1.1(a).

---

[1] *United States v. Farnsworth*, 92 F.3d 1001 (10 th Cir.1996)(finding that prior conviction for vehicular manslaughter was a "crime of violence" for purposes of enhancement under U.S.S.G. § 2K2.1).

This Court reviews a district court's factual findings in the application of the Sentencing Guidelines for clear error. *See United States v. Hamilton,* 929 F.2d 1126, 1130 (6th Cir.1991). The application of particular provisions of the Sentencing Guidelines to the facts as determined by the district court is a legal question and is reviewed de novo. See *United States v. Sanchez,* 928 F.2d 1450, 1458 (6 th Cir.1991).

First, defendant argues that operating a motor vehicle while intoxicated resulting in the death of another person is not an aggravated felony. U.S.S.G. § 2L1.2(b)(1)(A) provides that when sentencing a defendant who was previously deported after a criminal conviction, the district court must increase the base offense level by sixteen levels if the prior conviction was an aggravated felony. Application note one of § 2L1.2 directs the sentencing court to 8 U.S.C. § 1101(43) (1999) for the definition of aggravated felony. *See* U.S.S.G. § 2L1.2, comment (n.1). Section 1101(43)(F) defines the term "aggravated felony" as "a crime of violence (as defined in[18 U.S.C. § 16]) ... for which the term of imprisonment is at least one year." Title 18 defines "a crime of violence" as:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.
> 18 U.S.C. § 16 (West Supp.1999).

The 1994 Indiana statute defendant violated provides that a person who causes the death of another person when operating a motor vehicle while intoxicated commits a Class C felony.[2] Ind.Code Ann. § 9-30-5-5(a) (West 1994). This prior conviction is both "an offense that has an element the use ... of physical force against the person or property of another," *see* 18 U.S.C. § 16(a), and "an offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." *see* 18 U.S.C. § 16(b); *see also, United States v. Sanders,* 97 F.3d 856 (6 th Cir.1996)(holding that the crime of involuntary manslaughter under Ohio law is a "violent felony" for purposes of 18 U.S.C. § 924(c)). *Cf. United States v. Farnsworth,* 92 F.3d 1001 (10 th Cir.1996)(concluding that driving under the influence of drugs or alcohol clearly was conduct that presented a serious potential risk of physical injury to another); *United States v. Rutherford,* 54 F.3d 370 (7th Cir.1995), *cert. denied,* 116 S.Ct. 323 (1995)(holding that vehicular assault by a drunk driver is a crime of violence); *United States v. Fry,* 51 F.3d 543 (5 th Cir.1995)(holding that causing the death of another while driving under the influence was clearly conduct that presented a serious potential risk of physical injury to another); *United States v. Payton,* 28 F.3d 17 (4 th Cir.1994)(holding that previous involuntary manslaughter conviction constituted a crime of violence), *cert. denied,* 115 S.Ct. 452 (1994).

***3** Thus, Santana-Garcia's drunk driving homicide meets the definition of a "crime of violence" under 8 U.S.C. § 1101(43), and is an aggravated felony for purposes of § 2L1.2(b)(1)(A). Therefore, we affirm the district court's

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[2] Additionally, Ind.Code Ann. § 35-50-1-2(12) (1998) defines a "crime of violence" to include "causing death when operating a motor vehicle."

enhancement of defendant's base offense level by sixteen levels pursuant to § 2L1.2(b)(1)(A).

Next, defendant argues that the District Court erred when it denied him a reduction for acceptance of responsibility under U.S.S.G. § 3E1.1(a). The district court's decision whether to grant a reduction for acceptance of responsibility is reviewed for clear error. *United States v. Corrigan,* 128 F.3d 330, 336 (6 th Cir.1997). "The sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility. For this reason, the determination of the sentencing judge is entitled to great deference on review." U.S.S.G. § 3E1.1, comment (n.5). Generally, the district court's conclusion that a defendant is not entitled to an adjustment for acceptance of responsibility is considered a question of fact that "normally enjoys the protection of the clearly erroneous standard, and will not be overturned unless it is without foundation." *United States v. Jeter,* 191 F.3d 637, 638 (6 th Cir.1999).

U.S.S.G. §§ 3E1.1(a) provides that "if the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels." Commentary to § 3E1.1 provides:

> Entry of a plea of guilty prior to the commencement of the trial combined with truthfully admitting the conduct comprising the offense of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which he is accountable under § 1B1.3 ... will constitute significant evidence of acceptance of responsibility for the purposes of subsection(a). However, this evidence may be outweighed by conduct of the defendant

> that is inconsistent with such acceptance of responsibility. U.S.S.G. § 3E1.1, comment (n.3).

In this case, the presentence investigation report recommended declining defendant's request for an adjustment for acceptance of responsibility. The report stated that the totality of defendant's behavior was inconsistent with acceptance of responsibility as evidenced by the fact that defendant had entered the country illegally on three occasions and had not engaged in any post-conviction rehabilitative efforts. Additionally, the probation officer determined that defendant's contrition was for the benefit of the court, and was not sincere.

At the sentencing hearing, the court found that defendant had not accepted responsibility when defendant admitted that he was addicted to alcohol and he was not willing to do anything to help himself. Specifically, the Judge stated:

> But as I understand acceptance of responsibility to say, "It is my fault that I killed somebody a few years ago. It is my fault that I came back to the United States, even though times were hard. It is my fault that I drove a car drunk again, this time with a .17 reading, [.0]7 above the level that the state of Michigan has determined is drunk for the purposes of drunk driving, and it's unable for him to appreciate the difficulty--the relationship between the event of coming back illegally as an alien and drinking and driving. He doesn't see the connection. There is a connection, of course, and the connection is that it puts people of the

United States in direct jeopardy of him. So, he simply hasn't accepted responsibility.

***4** Defendant argues that he has tried to stop his abuse of alcohol. Additionally, defendant argues that after his motion for acceptance of responsibility was denied, he did demonstrate an acceptance of responsibility by stating that he was sorry for what he had did and wished that he could go back and change things.

We find that the facts and the lengthy sentencing hearing enabled the sentencing judge to be in the best position to evaluate the defendant's acceptance of responsibility. The district court properly found that defendant failed to comprehend the nexus between his being an illegal alien while repeatedly drinking and driving presents a serious potential risk of physical injury to other persons. This failure to understand the nexus is evidence of defendant's failure to accept responsibility for his offense. Therefore, there being no clear error, we affirm the district court's conclusion that defendant is not entitled to an adjustment for acceptance of responsibility.

III.

For the foregoing reasons, we AFFIRM Santana-Garcia's sentence.

United States Court of Appeals,
Ninth Circuit.
Daniel URSU, Petitioner,
v.
IMMIGRATION AND NATURALIZATION SERVICE
Respondent.
No. 99-70678.
I & NS No. A29-388-188.
Submitted Sept. 14, 2001.*

Decided Oct. 5, 2001.

Alien petitioned for judicial review of order of Board of Immigration Appeals (BIA) affirming decision of immigration judge to order him removed. The Court of Appeals held that: (1) jurisdiction to review order of removal existed; (2) offense of driving under the influence (DUI)/manslaughter under Florida law is not "aggravated felony"; (3) alien's conviction for DUI/manslaughter was for "particularly serious crime," rendering alien ineligible for asylum and withholding of removal; and (4) Court of Appeals could not consider alien's estoppel argument.

Affirmed.

***703** On Petition for Review of an Order of the Board of Immigration Appeals.

Before KOZINSKI and GOULD, Circuit Judges, and SCHWARZER,** Senior District Judge.

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* The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R.App. P. 34(a)(2).

** The Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

*704 MEMORANDUM***

**1 Daniel Ursu appeals a final order of the Board of Immigration Appeals (BIA) affirming an Immigration Judge's (IJ) decision to order him removed to Romania. We affirm.

Because the parties are familiar with the facts and procedural history, we do not restate them here except as necessary to explain our disposition.

Ursu entered the United States on October 2, 1990, with a six-month visitor visa. Ursu maintains that he filed an application for political asylum on October 19, 1990. The application does not appear in the record. No action was ever taken on the purported application. Ursu remained in the United States illegally.

On December 11, 1997, Ursu was convicted of DUI/Manslaughter, Fla. Stat. § 316.193(3), a second degree felony under Florida law, and sentenced to eighteen months of imprisonment. Ursu had driven while intoxicated and had struck and killed another driver.

After Ursu's release from prison, the Immigration and Naturalization Service (INS) sought to deport him on the bases that he had remained in the United States illegally, 8 U.S.C. § 1227(a)(1)(B) (1998),[1] and that he had been

*** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

[1] We cite the 1998 version of the United States Code throughout because that version was in effect when the INS initiated removal proceedings against Ursu in February 1998, and the relevant statutes have been frequently amended

convicted of an aggravated felony, 8 U.S.C. § 1227(a)(2)(A)(iii) (1998). After a hearing, the IJ ordered Ursu's removal. The BIA affirmed, holding that Ursu was deportable because he had committed an aggravated felony, *id.*, and that he was ineligible for withholding of removal because, "having been convicted ... of a particularly serious crime," he was a danger to the community, 8 U.S.C. § 1231(b)(3)(B)(ii) (1998). The BIA further held that the INS was not estopped from deporting him based on its alleged failure to act on his petition for asylum.

We review the issue of our jurisdiction *de novo*. *See Sareang Ye v. INS,* 214 F.3d 1128, 1131 (9th Cir.2000). We also review *de novo* the BIA's determination that Ursu is ineligible for withholding of removal; however, we accord considerable deference to the BIA's interpretation of the relevant statute. *See Ramirez-Ramos v. INS,* 814 F.2d 1394, 1396 (9th Cir.1987).

[1] The BIA determined that Ursu had been convicted of an aggravated felony and was therefore deportable. Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub.L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996), we have jurisdiction to review the BIA's order of removal only if Ursu was *not* convicted of an aggravated felony. *See Sareang Ye,* 214 F.3d at 1131; *see also* 8 U.S.C. § 1252(a)(2)(C) (1998). Because of our holding in *United States v. Trinidad- Aquino,* 259 F.3d 1140 (9th Cir.2001), the INS now concedes that Ursu was not convicted of an aggravated felony. We agree and hold that we have jurisdiction to review the BIA's removal order.

[2] The BIA held that Ursu had been convicted of an aggravated felony as defined in 8 U.S.C. § 1101(a)(43)(F)

(1998), which defines an "aggravated felony" as "a crime of violence." Such a conviction would make him ineligible for asylum, 8 U.S.C. § 1158(b)(2)(B)(i) (1998), and ***705*** would preclude our review, 8 U.S.C. § 1252(a)(2)(C) (1998). The court in *Trinidad- Aquino* held that the California crime of driving under the influence with injury to another, Cal. Veh.Code § 23153, was not an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) (1998), *i.e.,* that it was not a crime of violence, because it could be committed with a *mens rea* of negligence. *Trinidad-Aquino,* 259 F.3d at 1145. As with the California statute at issue in *Trinidad-Aquino,* a person can violate section 316.193(3) under Florida law by acting with a *mens rea* of negligence. *See generally State v. Van Hubbard,* 751 So.2d 552 (Fla.1999). We conclude that DUI/Manslaughter under Florida law is not an aggravated felony within the meaning of 8 U.S.C. § 1101(a)(43)(F) (1998), and that therefore 8 U.S.C. § 1252(a)(2)(C) (1998) does not preclude our review.

**2 [3] We turn to the question of whether DUI/Manslaughter is a "particularly serious crime." If it is, then Ursu is ineligible for asylum under 8 U.S.C. § 1158(b)(2)(A)(ii) (1998), and ineligible for withholding of removal under 8 U.S.C. § 1231(b)(3)(B)(ii) (1998).[2] [FN2]We grant the BIA's interpretation of the term deference

[2] 8 U.S.C. § 1158(b)(2)(A)(ii) (1998) provides that the Attorney General does not have the power to grant asylum if the "alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States." 8 U.S.C. § 1231(b)(3)(B)(ii) (1998) provides that withholding of removal is not available when "the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States." The BIA has consistently viewed the commission of a "particularly serious crime" itself as signifying that petitioner constitutes a danger to the community. *See, e.g., In re S-S-,* 1999 BIA LEXIS 1, at *23-24, Interim Decision 3374 (1999); *see also Ahmetovic v. INS,* 62 F.3d 48, 52 (2d Cir.1995); *Ramirez-Ramos,* 814 F.2d at 1397.

because it is the agency charged with enforcing the statute. *See Ramirez-Ramos,* 814 F.2d at 1396.

[4] The determination of whether a crime qualifies as particularly serious requires an examination of "the nature of the conviction, the type of sentence imposed, and the circumstances and facts underlying the conviction." *Mahini v. INS,* 779 F.2d 1419, 1421 (9th Cir.1986). Here, the BIA determined that the crime was particularly serious in light of the facts that Ursu had caused the death of another human being and that he was so intoxicated that he failed to realize that he had injured someone and continued to drive until his car became disabled. The BIA emphasized that the seriousness of the crime of driving under the influence and the substantial risk of harm from that behavior have been widely recognized.

The BIA's holding in the case before us is thus consistent with its prior decisions, and is entitled to our deference, provided that it reflects a reasonable interpretation of the statute. *See, e.g., Wilshire Westwood Assocs. v. Atl. Richfield Corp.,* 881 F.2d 801, 809 (9th Cir.1989). Given that Ursu caused the death of another human being and that he was so impaired that he continued to operate his vehicle without realizing what he had done, we agree with the reasonableness of the BIA's decision that his crime was particularly serious. We affirm the BIA's holding that Ursu is not entitled to withholding of removal under 8 U.S.C. § 1231(b)(3)(B)(ii) (1998).

[5] Finally, we turn to Ursu's argument that INS should be estopped from deporting him. Even leaving aside the formidable barriers to bringing an estoppel claim against a United States government agency, *see, e.g., Sulit v. Schiltgen,* 213 F.3d 449, 454 (9th Cir.2000), we cannot ***706*** evaluate Ursu's estoppel claim because his asylum

application is not in the record. The immigration laws explicitly provide that "the court of appeals shall decide the petition only on the administrative record on which the order of removal is based." 8 U.S.C. § 1252(b)(4)(A) (1998). *See also Fisher v. INS*, 79 F.3d 955, 963 (9th Cir.1996) (en banc). Because no evidence of Ursu's 1990 asylum application is before us, even if we assume Ursu did file such an application, we cannot properly on this record determine the merits of his estoppel claim.

AFFIRMED.

No. 03-583

In the Supreme Court of the United States

JOSUE LEOCAL, PETITIONER

v.

JOHN D. ASHCROFT, ATTORNEY GENERAL, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether driving under the influence and causing serious bodily injury by reason of the operation of the vehicle, in violation of Fla. Stat. Ann. § 316.193(3)(c)(2) (West 2001), is a crime of violence under 18 U.S.C. 16, which renders an alien removable under the immigration laws as an aggravated felon.

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In the Supreme Court of the United States

No. 03-583

JOSUE LEOCAL, PETITIONER

v.

JOHN D. ASHCROFT, ATTORNEY GENERAL, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (J.A. 115-117) is unreported. The opinion of the Board of Immigration Appeals (J.A. 105-108) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 2003. The petition for a writ of certiorari was filed on September 29, 2003, and granted on February 23, 2004. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 16 of Title 18 of the United States Code provides as follows:

The term "crime of violence" means—

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

2. Section 316.193 of the Florida Statutes Annotated (West 2001) provides, in part, as follows:

(1) A person is guilty of the offense of driving under the influence * * * if the person is driving or in actual physical control of a vehicle within this state and:

(a) The person is under the influence of alcoholic beverages, any chemical substance set forth in s. 877.111, or any substance controlled under chapter 893, when affected to the extent that the person's normal faculties are impaired;

(b) The person has a blood-alcohol level of 0.08 or more grams of alcohol per 100 milliliters of blood; or

(c) The person has a breath-alcohol level of 0.08 or more grams of alcohol per 210 liters of breath.

* * * * *

(3) Any person:

(a) Who is in violation of subsection (1);

(b) Who operates a vehicle; and

(c) Who, by reason of such operation, causes:

* * * * *

2. Serious bodily injury to another, as defined in s. 316.1933, commits a felony of the third degree * * * .

3. Section 316.1933(1)(b) of the Florida Statutes Annotated (West Supp. 2004) provides as follows: "The term 'serious bodily injury' means an injury to any person, including the driver, which consists of a physical condition that creates a substantial risk of death, serious personal disfigurement, or protracted loss or impairment of the function of any bodily member or organ."

STATEMENT

1. Under Section 237(a) of the Immigration and Nationality Act, 8 U.S.C. 1227(a) (2000 & Supp. I 2001), several classes of aliens are subject to removal, including those who have been convicted of an "aggravated felony" at any time after admission to the United States. 8 U.S.C. 1227(a)(2)(A)(iii). Many offenses satisfy the definition of "aggravated felony," including "a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year." 8 U.S.C. 1101(a)(43)(F). Section 16 of Title 18 in turn defines "crime of violence" as (a) "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another" or (b) "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

2. Petitioner is a native and citizen of Haiti. In 1980, he was paroled into the United States. In 1987, he became a lawful permanent resident. J.A. 84; A.R. 298.

On January 7, 2000, at 1:25 a.m., petitioner drove through a flashing red light at an intersection in Miami-Dade County, Florida, and struck another car. The driver of the car petitioner struck was pinned behind the steering wheel and had to be extracted by rescue workers before being taken to a hospital for treatment. A passenger in the car was treated for minor injuries at the scene. J.A. 25-29, 92.

The police officers who responded to the scene smelled alcohol on petitioner's breath and observed a half-empty bottle of whiskey on the floor of his car. Petitioner admitted that he had been drinking, but was unaware of what had happened; he told the officers that he was tired and wanted to go to sleep. When one of the officers attempted to give petitioner a sobriety test, petitioner shoved him in the chest. He then pushed the officers away when they attempted to arrest him. The officers ultimately succeeded in placing petitioner under arrest and transported him to a hospital ward, where blood was forcibly drawn. The blood test confirmed that petitioner was intoxicated. J.A. 29-31, 92-93.

Petitioner was charged by the Florida State Attorney with two counts of driving under the influence and causing serious bodily injury by reason of the operation of the vehicle, in violation of Fla. Stat. Ann. § 316.193(3)(c)(2) (West 2001).[1] He was also

[1] The current version of the Florida statute differs from the version in effect at the time of petitioner's crime, in that the current version describes the offense as driving under the influence and causing "or contribut[ing] to causing" serious bodily injury

charged with battery against a law-enforcement officer and resisting arrest. He pleaded guilty to the first two counts and was sentenced to two and a half years in prison. J.A. 1-21, 33-38.

3. In November 2000, in light of his Florida conviction, the Immigration and Naturalization Service (INS) initiated removal proceedings against petitioner.[2] The basis for the charge of removability was that a conviction under Section 316.193(3)(c)(2) constitutes a "crime of violence," and that petitioner had therefore been convicted of an "aggravated felony." An immigration judge (IJ) found petitioner removable, declined to grant relief from removal, and ordered him removed to Haiti. J.A. 83-103.

4. After initially affirming the IJ's decision without opinion, J.A. 104, the Board of Immigration Appeals (BIA) vacated its decision, reopened the removal proceedings, and then issued an opinion dismissing petitioner's appeal, J.A. 105-108. Relying on *Le* v. *United States Attorney General*, 196 F.3d 1352 (11th Cir. 1999) (per curiam), which held that the Florida offense of which petitioner was convicted is a crime of violence under 18 U.S.C. 16(a), the BIA affirmed the IJ's conclusion that petitioner was an aggravated felon and thus removable. J.A. 106-107. The BIA considered itself bound by *Le* because of its "obligation to defer to circuit court interpretations of provisions of federal criminal law," J.A. 107, and because petitioner's re-

by reason of the operation of the vehicle. Fla. Stat. Ann. § 316.193(3)(c)(2) (West 2001 & Supp. 2004).

[2] On March 1, 2003, the INS's immigration-enforcement functions were transferred to United States Immigration and Customs Enforcement in the Department of Homeland Security. See Homeland Security Act of 2002, Pub. L. No. 107-296, Tit. II, § 441, 116 Stat. 2192 (to be codified at 6 U.S.C. 251).

moval proceedings arose in the Eleventh Circuit, J.A. 106. The BIA also affirmed the IJ's conclusion that petitioner was not entitled to relief from removal. J.A. 107-108.

5. The court of appeals dismissed petitioner's petition for review. J.A. 115-117. The court observed that, under 8 U.S.C. 1252(a)(2)(C), which deprives courts of jurisdiction to review an order of removal against an alien removable by reason of having committed certain offenses (including an aggravated felony), it had jurisdiction only to determine whether petitioner was an alien who is removable based on a conviction for such an offense. J.A. 116. Since petitioner did not dispute that he was an alien, the court turned to the question whether his conviction rendered him removable as an aggravated felon. *Ibid.* Relying on its decision in *Le*, which "squarely held" that a conviction under Fla. Stat. Ann. § 316.193(3)(c)(2) is a "crime of violence" under 18 U.S.C. 16, the court concluded that petitioner was removable as an aggravated felon. J.A. 117. In reaching that conclusion, the court rejected petitioner's contention that *Le* had merely deferred to a BIA interpretation of 18 U.S.C. 16 that has since been abandoned. J.A. 117. The court explained that *Le* had "made a binding, *de novo* determination that a DUI that causes serious bodily injury to another is a crime of violence." *Ibid.* (citing *Le*, 196 F.3d at 1354).[3]

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[3] In November 2002, after the BIA dismissed petitioner's appeal but before the court of appeals dismissed his petition for review, the INS removed petitioner to Haiti. An alien's removal does not preclude any direct judicial review to which he is otherwise entitled. See, *e.g.*, *Moore* v. *Ashcroft*, 251 F.3d 919, 922 (11th Cir. 2001).

SUMMARY OF ARGUMENT

The Florida offense of which petitioner was convicted—driving under the influence and causing serious bodily injury by reason of the operation of the vehicle—is a crime of violence under 18 U.S.C. 16.

I. The Florida offense is a crime of violence under Section 16(a), because it "has as an element the use * * * of physical force against the person or property of another." Contrary to petitioner's contentions, the "use" of physical force need not be intentional, and causing serious bodily injury by the operation of a vehicle necessarily entails the use of "physical force" against a person.

A. Section 16(a) does not mention intent, and the word "use," standing alone, does not require it. While dictionaries define "use" as the employment of something for an end or purpose, they also include definitions that do not have a volitional element. Whether "use" requires intent depends on the thing that is being used, and since physical force can be applied either intentionally or accidentally, the term "use" in Section 16(a) does not have a *mens rea* component. *Smith* v. *United States*, 508 U.S. 223 (1993), and *Bailey* v. *United States*, 516 U.S. 137 (1995), do not require a different result. Those cases held that the "use" of a firearm must be active (as opposed to passive); they did not address the question whether the "use" of force must be intentional (as opposed to accidental).

There is no merit to petitioner's contention that the "accidental use of force" is a nonsensical concept, since that very phrase has been used by the courts of at least one state to describe a defense to a crime, see *People* v. *Walls*, 586 N.E.2d 792, 797 (Ill. App. Ct. 1992); *People* v. *Shelton*, 489 N.E.2d 879, 883 (Ill. App. Ct. 1986), and the

legislature of another State has defined "physical abuse" as the "non-accidental use of force" resulting in injury, see N.Y. Soc. Serv. Law § 473(6)(a) (McKinney 2003). The fact that Congress often modifies the verb "use" with "intentionally" or "willfully" is further evidence that the word, by itself, does not encompass any particular mental state. Nor would it be proper to infer an intent requirement on the theory that strict-liability offenses are disfavored, since 18 U.S.C. 16 merely classifies crimes that have been defined elsewhere. In any event, the Florida offense is not a "classic strict liability" crime, inasmuch as drunk driving inherently "involves culpability." *Baker* v. *State*, 377 So.2d 17, 20 (Fla. 1979). Finally, the presence of the terms "attempted use" and "threatened use" in 18 U.S.C. 16(a) does not assist petitioner, since the fact that an attempt or threat requires intent does not mean that the same is true of the object of the attempt or threat. See, *e.g.*, *Braxton* v. *United States*, 500 U.S. 344, 351 n.* (1991).

B. Every violation of the Florida statute entails the use of "physical force." That is obviously true of a typical violation, like petitioner's, where a drunk driver crashes his vehicle into another vehicle or person. It is also true of the atypical violations described by petitioner. A drunk driver uses physical force against the person of another if he swerves and thereby causes a pedestrian (or another driver) to jump (or swerve) out of the way to avoid being struck, and he uses physical force against the person of another if he stops his car on a highway and thereby causes an unsuspecting driver to collide with it.

II. The Florida offense is also a crime of violence under Section 16(b), because it "is a felony * * * that, by its nature, involves a substantial risk that physical force against the person or property of another may be

used in the course of committing the offense." Even if, as petitioner contends, a drunk driver does not use physical force unless he collides with another vehicle or person, and even if, as a consequence, physical force is not an element of the Florida offense, any person who not only drives drunk but also swerves off the road or stops his car on the highway manifestly is driving in a way that creates a substantial risk of such a collision. The only possible objection to the view that the Florida offense is a crime of violence under Section 16(b)—that the requisite "use" of force must be intentional—fails for the same reasons that the "use" of force required by Section 16(a) need not be intentional. If it does not affirm the court of appeals' Section 16(a) holding, this Court can and should decide that the Florida offense is a crime of violence under Section 16(b) even though the court of appeals did not reach the issue, because the issue is included within the question presented, it is a valid basis for affirming the judgment, and it has divided the lower courts.

III. Petitioner's interpretation of Section 16 finds no support in 8 U.S.C. 1101(h), which defines "serious criminal offense" as (1) any felony, (2) any crime of violence (as defined in 18 U.S.C. 16), or (3) any reckless- or drunk-driving crime "if such crime involves personal injury to another." As an initial matter, the views of the Congress that enacted 8 U.S.C. 1101(h) (the 101st) are a "hazardous basis," *e.g.*, *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 355 (1998), for inferring the intent of the Congress that enacted 18 U.S.C. 16 (the 98th). In any event, interpreting "crime of violence" to include the statutory offense of drunk driving resulting in injury does not, as petitioner contends, render Section 1101(h)(3) superfluous. A person who causes an injury while committing the simple misdemeanor

offense of driving under the influence has committed a "serious criminal offense" under Section 1101(h)(3) but not under Section 1101(h)(2). Finally, the 101st Congress might have enacted Section 1101(h)(3) simply to ensure that drunk driving involving injury was covered no matter how courts ultimately interpreted Section 16.

ARGUMENT

DRIVING UNDER THE INFLUENCE AND CAUSING SERIOUS BODILY INJURY BY REASON OF THE OPERATION OF THE VEHICLE, IN VIOLATION OF FLA. STAT. ANN. § 316.193(3)(c)(2), IS A CRIME OF VIOLENCE UNDER 18 U.S.C. 16

Under Fla. Stat. Ann. § 316.193(3)(c)(2), it is a third-degree felony for a person to drive under the influence and cause serious bodily injury by reason of the operation of the vehicle. This offense is a "crime of violence" under each of the alternative definitions of that "broadly defined" term, *INS* v. *St. Cyr*, 533 U.S. 289, 296 n.4 (2001), in 18 U.S.C. 16.[4]

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[4] At least 40 other States have enacted statutes that criminalize drunk driving resulting in injury. See Ala. Code § 13A-6-20(a)(5) (1994); Cal. Veh. Code § 23153 (West 2000); Colo. Rev. Stat. Ann. § 18-3-205(1)(b)(I) (West 2003); Conn. Gen. Stat. Ann. § 53a-60d(a) (West 2001); Del. Code Ann. tit. 11, §§ 628(2), 629 (1995); Ga. Code Ann. § 40-6-394 (2001); Idaho Code § 18-8006(1) (2004); 625 Ill. Comp. Stat. Ann. 5/11-501(d)(1)(C) (West 2002); Ind. Code Ann. § 9-30-5-4(a) (Michie 1997 & Supp. 2003); Iowa Code Ann. § 707.6A(4) (West 2003); Ky. Rev. Stat. Ann. § 189A.010(1) and (11)(c) (Michie 1997 & Supp. 2003); La. Rev. Stat. Ann. §§ 14:39.1(A), 14:39.2(A) (West 1997 & Supp. 2004); Me. Rev. Stat. Ann. tit. 29-A, § 2411(1-A)(D)(1) (West 1996 & Supp. 2003); Md. Code Ann., Crim. Law § 3-211(c) and (d) (West 2002 & Supp. 2003); Mass. Ann. Laws ch. 90, § 24L(1) (Law. Co-op. 1994 & Supp. 2004); Mich. Comp. Laws Ann. § 257.625(5) (West 2001 & Supp. 2004); Miss. Code Ann. § 63-11-30(5) (1999 & Supp. 2003); Mo. Ann. Stat. § 565.060(1)(4) (West 1999); Mont. Code Ann. § 45-5-205(1) (2003); Neb. Rev. Stat. Ann. § 60-6,198(1) (Michie 2002); Nev. Rev. Stat. Ann. § 484.3795(1) (Michie 2003 & Supp. 2003); N.H. Rev. Stat. Ann. § 265:82-a(I)(b) and (II)(b) (2001 & Supp. 2003); N.J. Stat. Ann. § 2C:12-1(c) (West 1995 & Supp. 2004); N.M. Stat. Ann. § 66-8-101(B) (Michie 1998 & Supp. 2002); N.D. Cent. Code § 39-08-01.2(1)(b) and (c) (1987); Ohio Rev. Code Ann. § 2903.08(A)(1)(a) (Anderson 2003); Okla. Stat. Ann. tit. 47, § 11-904(B)(1) (West 2000); 75 Pa. Cons. Stat. Ann. § 3804(b) (West 1996 & Supp. 2004); R.I. Gen. Laws § 31-27-2.6(a) (2002); S.C. Code Ann. § 56-5-2945(A)(1) (Law. Co-op. 1991 & Supp. 2003); S.D. Codified Laws § 22-16-42 (Michie 1998 & Supp. 2003); Tenn. Code Ann. § 39-13-106(a) (2003); Tex. Penal Code Ann. § 49.07(a)(1) (Vernon 2003); Utah Code Ann. § 41-6-44(3)(a)(ii)(A) and (3)(b) (1998 & Supp. 2003); Vt. Stat. Ann. tit. 23, § 1210(f) (1999 & Supp. 2003); Va. Code Ann. § 18.2-51.4(A) (Michie Supp. 2003); Wash. Rev. Code Ann. § 46.61.522(1)(b) (West 2001 & Supp. 2004); W. Va. Code Ann. § 17C-5-2(c) (Michie 2000 & Supp. 2004); Wis. Stat. Ann. § 940.25(1) (West 1996 & Supp. 2002); Wyo. Stat. Ann. § 31-5-233(h) (Michie 2003).

I. PETITIONER'S VIOLATION OF FLA. STAT. ANN. § 316.193(3)(c)(2) IS A CRIME OF VIOLENCE UNDER 18 U.S.C. 16(a)

Le v. *United States Attorney General*, 196 F.3d 1352 (11th Cir. 1999) (per curiam), on which the court below relied, held that the Florida offense at issue here is a crime of violence under 18 U.S.C. 16(a). See 196 F.3d at 1354. Section 16(a) defines "crime of violence" as "an offense that has as an element [1] the use, attempted use, or threatened use [2] of physical force against the person or property of another." An "element" of an offense is "a fact that must be proven beyond a reasonable doubt to obtain a conviction." *Chrzanoski* v. *Ashcroft*, 327 F.3d 188, 192 (2d Cir. 2003). *Le* correctly held that drunk driving resulting in serious bodily

injury requires proof of the use of physical force against a person.

Petitioner offers two independent reasons why the use of physical force is not a fact that must be proved in order for a defendant to be found guilty of violating Fla. Stat. Ann. § 316.193(3)(c)(2). First, he contends that the "use" of physical force means the intentional use of physical force, and under the Florida statute, a person can cause serious bodily injury unintentionally. Pet. Br. 11-23; accord NACDL Br. 14-20. Second, he contends that, regardless of whether "use" requires intent, a person can cause serious bodily injury under the Florida statute without using "physical force." Pet. Br. 24-34; accord NACDL Br. 8-14. Neither contention has merit.

A. Under 18 U.S.C. 16(a), The "Use" Of Physical Force Need Not Be Intentional

In arguing that an offense is not a crime of violence under Section 16(a) unless the "use" of physical force is intentional, petitioner faces a significant obstacle: "the language of the statute does not state that * * * [the] use of physical force must be intentional." *Omar* v. *INS*, 298 F.3d 710, 715 (8th Cir. 2002). Indeed, not only does the text of Section 16(a) "not mention intent," *United States* v. *Rutherford*, 54 F.3d 370, 378 (7th Cir.) (Easterbrook, J., concurring) (interpreting similarly worded Sentencing Guideline), cert. denied, 516 U.S. 924 (1995); it contains "no mens rea language" at all, *United States* v. *Vargas-Duran*, 356 F.3d 598, 611 (5th Cir.) (en banc) (E. Garza, J., dissenting) (interpreting another similarly worded Sentencing Guideline), cert. denied, 124 S. Ct. 1728 (2004), and pet. for cert. pending, No. 03-1514 (filed May 7, 2004). Attempting to overcome the absence of any such qualification in the

statute, petitioner relies on text and context. He contends that the word "use," by definition, "includes intent," Pet. Br. 13; and he contends that the word "use" in Section 16(a) must include intent, because "the adjacent statutory terms, 'attempted use' and 'threatened use,' both * * * are intentional acts," *id.* at 15. There is no merit to either contention. Someone who drunkenly (though unintentionally) crashes his car into another has "used" physical force against his victim.

1. The word "use" does not have a mens rea component

a. In support of his contention that intent is inherent in the term "use," petitioner relies on dictionaries that define the word to mean the employment of a thing for a purpose or to achieve an end. Pet. Br. 13-14 & n.3. "Having a 'purpose' or attaining 'an end,'" petitioner says, "entails having an intent to accomplish something; not something done accidentally or unintentionally." *Id.* at 14. But while the dictionaries on which petitioner principally relies, see *id.* at 13, arguably suggest that "'use' * * * more often refer[s] to the intentional, rather than the accidental, use of force," each dictionary indicates, "without question, [that] force may be used accidentally." *United States* v. *Chapa-Garza*, 262 F.3d 479, 482 (5th Cir. 2001) (Barksdale, J., dissenting from denial of rehearing en banc). One of those dictionaries defines "use," in part, as "to put into action or service, *especially* to attain an end," *Black's Law Dictionary* 1382 (5th ed. 1979) (emphasis added), and the other sums up the multiple definitions of the word by stating that "USE is general and indicates any putting to service of a thing, *usu[ally]* for an intended or fit purpose," *Webster's Third New International Diction-*

ary 2524 (1981) (emphasis added). These definitions "suggest[], of course, that a purpose is not always intended." *Chapa-Garza*, 262 F.3d at 482 n.2 (Barksdale, J., dissenting).[5]

Petitioner's amici cite a definition from another dictionary—the Oxford English Dictionary (OED)—that is similar to the definitions on which petitioner relies. NACDL Br. 15. But as Judge Easterbrook has observed, that dictionary "includes dozens of definitions of 'use' that do not suggest any mental ingredient." *United States* v. *Rutherford*, 54 F.3d at 378 n.† (concurring opinion). For example, while petitioner's amici would presumably have the Court adopt the OED's seventh definition of the verb "use" ("to employ for a certain end or purpose"), its sixth definition ("[t]o put into practice or operation; to carry into action or effect") does not suggest any volitional component. 11 *Oxford English Dictionary* 471 (1978). *Webster's* is similar. While its third definition of the verb is "to carry out a purpose or action by means of" (something that is necessarily done intentionally), its second definition is "to put into action or service" (something that does not require intent). *Webster's Third New International Dictionary*, *supra*, at 2523-2524.

Indeed, one could reasonably infer from the dictionaries on which petitioner relies that the employment of something for a purpose is not even the *primary* definition of "use," much less the sole one. Section 16(a) employs "use" as a noun, and the first of the several

[5] The dictionaries we cite are the editions that were current in 1984, the year of Section 16's enactment. As far as we are aware, there are no material differences between the definitions of "use" found in these editions and the definitions found in the later editions cited by petitioner and his amici.

definitions of the noun in both *Webster's* and *Black's* includes "application," *Webster's Third New International Dictionary*, *supra*, at 2523; *Black's Law Dictionary*, *supra*, at 1382, an action that can be carried out unintentionally, as the choice of language in petitioner's own brief confirms.[6] "Application" is also a word that can be comfortably substituted for the word "use" in 18 U.S.C. 16(a).

Because "a word is known by the company it keeps," *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 575 (1995), the correct definition of "use" in a particular context is likely to depend on the thing that is being used. The narrower definition of "use" might therefore be applicable if the Court were interpreting, say, a statute that defined "crime of deception" as an offense that has as an element "the use of fraud," because someone who employs fraud is necessarily acting purposefully. But since "physical force" can be applied either intentionally

[6] See, *e.g.*, Pet. Br. 7 ("use" does not encompass "the accidental, unintentional or even negligent applications of force"); *id.* at 12 (under Florida statute, "the unintentional, negligent and/or accidental application of force" is sufficient); *id.* at 14 ("[a]ccidental, negligent or unintentional applications of force" do not satisfy definition of "use"); *id.* at 16 ("The plain meaning of § 16(a) establishes that a crime of violence requires more than the accidental or negligent application of force against another."); *id.* at 18 ("[t]he mere application of force against the person of another does not necessarily mean that the application was intentional"); *id.* at 19 (both subsections of Section 16 contain language critical to determining whether "offenses that involve the unintentional or accidental application of force against another" are "crimes of violence"); *id.* at 23 ("An unintentional or accidental application of force does not suffice for a crime of violence."); *id.* at 24 (Florida offense "do[es] not have as an element the application of any force (accidentally, negligently, intentionally or otherwise) against the person of another").

or accidentally, there is no basis for limiting "use" to intentional conduct in Section 16(a)'s definition of "crime of violence."

b. In addition to relying on dictionary definitions of "use," petitioner relies on *Smith* v. *United States*, 508 U.S. 223 (1993), and *Bailey* v. *United States*, 516 U.S. 137 (1995). Pet. Br. 14-15. In both cases, this Court interpreted the word "use" in 18 U.S.C. 924(c)(1), which criminalizes the use or carrying of a firearm during and in relation to certain types of crimes, including drug-trafficking crimes. In neither case, however, did the Court address the question whether a gun (or anything else) could be "used" unintentionally.

Smith involved a narrow issue: whether the exchange of a gun for drugs constitutes a "use" of the gun. The Court held that it does, but because such an exchange is necessarily made intentionally, the Court had no occasion to consider whether the "use" of a gun requires intent. *Smith* does say that, under Section 924(c)(1), the "presence or involvement" of a firearm "cannot be the result of accident or coincidence." 508 U.S. at 238. But that conclusion was based on the statutory requirement that the firearm be used "in relation to" a drug-trafficking crime, not on the requirement that it be "used." *Id.* at 237-239.

Bailey involved a broader issue: whether evidence of the proximity and accessibility of a firearm is sufficient to support a conviction for "use" of the firearm under Section 924(c)(1). The Court answered that question no, on the ground that the proximity-and-accessibility standard effectively equates use with possession. To avoid that result, the Court held that Section 924(c)(1) "requires evidence sufficient to show an *active employment* of the firearm by the defendant." 516 U.S. at 143. But in *Bailey*, as in *Smith*, the Court had no occasion to

consider whether the "use" of a gun requires intent. *Bailey* addressed the question whether "use" of a gun must be active (rather than passive), not whether it must be intentional (rather than inadvertent), and nothing in the Court's opinion is inconsistent with the view that a gun can be actively, though unintentionally, "used." Indeed, the Court observed in *Bailey* that "[t]he active-employment understanding of 'use'" includes, "most obviously," the firing of a gun, *id.* at 148, and as Judge Easterbrook has noted, "a gun may be discharged accidentally, and thus 'used,' in the same sense that a drunk driver may mow down a pedestrian without intending injury," *Rutherford*, 54 F.3d at 379 (concurring opinion).[7]

c. In arguing that "use" requires intentional conduct, petitioner says that "it would not make sense to 'use' something unintentionally or accidentally." Pet. Br. 14. Petitioner's amici go further. According to them, it would be "torturous" to apply the term to "accidental human conduct." NACDL Br. 16. Petitioner and his amici are mistaken. While there are some things that, by their nature, cannot be "accidentally used" (a plan, for example, or a trick), one can speak of the "accidental use" of many things without doing violence to ordinary English usage.

For example, there is nothing nonsensical, much less torturous, about referring to the "inadvertent use" of a particular word or phrase, as this Court's opinions

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[7] In *Jones* v. *United States*, 529 U.S. 848 (2000), which addressed the meaning of the "use" of property in commerce or commerce-affecting activity under the federal arson statute, 18 U.S.C. 844(i), the Court cited *Bailey* for the proposition that "use" ordinarily means "active employment." 529 U.S. at 855. As in *Smith* and *Bailey*, the Court in *Jones* had no occasion to consider whether "use" in that context requires intent.

demonstrate.[8] It is equally proper to refer to the "accidental use" of a weapon, as Congress has done.[9] One can also speak of the "accidental use of force." Indeed, Illinois courts have described the "accidental use of force" as a defense to a crime of violence, in holding that a defendant cannot simultaneously rely on that defense and the defense of self-defense, the latter of which "relates to the intentional or knowing use of force." *People* v. *Walls*, 586 N.E.2d 792, 797 (Ill. App. Ct. 1992) (quoting *People* v. *Purrazzo*, 420 N.E.2d 461, 467 (Ill. App. Ct. 1981), cert. denied, 455 U.S. 948 (1982)); *People* v. *Shelton*, 489 N.E.2d 879, 883 (Ill. App. Ct. 1986) (same). And the New York Legislature has defined "physical abuse" in the Social Services Law as "the non-accidental use of force" that results in injury, pain, or impairment, a definition that obviously presumes that force can be used accidentally. N.Y. Soc. Serv. Law § 473(6)(a) (McKinney 2003).

Nor does "use" *presumptively* mean intentional use, such that a qualifier is necessary only when Congress

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[8] See, *e.g.*, *Illinois Cent. R.R.* v. *Norfolk & Western Ry.*, 385 U.S. 57, 66 (1966) (lower court "inadvertently used" certain terminology in its opinion); *Magenau* v. *Aetna Freight Lines, Inc.*, 360 U.S. 273, 277 (1959) (referring to apparently "inadvertent use" of certain words in interrogatory submitted to jury); *Unexcelled Chem. Corp.* v. *United States*, 345 U.S. 59, 64 (1953) ("when Congress, though perhaps mistakenly or inadvertently, has used language which plainly brings a subject matter into a statute, its word is final").

[9] See Act of Nov. 26, 1991, Pub. L. No. 102-172, § 8132(c)(7), 105 Stat. 1209 (establishing commission to make recommendations concerning safeguards against threat of "accidental or unauthorized use" of nuclear weapons); National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 1441(a)(3), 104 Stat. 1690 (finding heightened concern regarding possible "accidental use" of Soviet nuclear weapons).

means something different. To the contrary, the United States Code is replete with statutes in which the verb "use" is modified by the adverb "intentionally" or "willfully."[10] Indeed, the same Act that added Section 16 to Title 18 added Section 1117(b) to Title 15, the latter of which allows treble damages for "intentionally using" a counterfeit trademark. Compare Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit.

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[10] See, *e.g.*, 8 U.S.C. 1367(c) ("willfully uses" information from alien who was battered or subjected to extreme cruelty); 12 U.S.C. 1715z-19 ("willfully uses" income from certain property for other than authorized purpose); 18 U.S.C. 708 ("willfully uses" coat of arms of Swiss Confederation); 18 U.S.C. 1385 ("willfully uses" part of Army or Air Force as posse comitatus); 18 U.S.C. 1543 ("willfully and knowingly uses" false passport); 18 U.S.C. 1735(a)(1) ("willfully uses" mails to deliver sexually oriented advertisements); 18 U.S.C. 2511(1)(b) ("intentionally uses" device to intercept oral communications); 18 U.S.C. 2511(1)(d) ("intentionally uses" intercepted communication); 21 U.S.C. 841(b)(6) ("intentionally uses" poison, chemical, or other hazardous substance); 21 U.S.C. 843(b) ("knowingly or intentionally to use" communication facility to commit drug crime); 26 U.S.C. 148(a) (bond is arbitrage bond if issuer "intentionally uses" portion of proceeds of issue of which bond is part in specified manner); 26 U.S.C. 9012(c)(1) ("knowingly and willfully to use" certain payments to candidates for other than specified purposes); 31 U.S.C. 1349(b) ("willfully uses" car or plane owned or leased by government for other than official purpose); 38 U.S.C. 5701(f) ("willfully uses" name or address of present or former member of Armed Forces for other than specified purposes); 42 U.S.C. 2188 ("intentionally used" patent in violation of antitrust laws); 47 U.S.C. 312a ("willfully used" radio license to distribute drugs); 47 U.S.C. 702(3) (communications satellite is earth satellite "intentionally used" to relay telecommunication information); Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, Tit. VI, § 601, 117 Stat. 686 (to be codified at 18 U.S.C. 25(b)) ("intentionally uses" minor to commit crime of violence).

II, § 1001(a), 98 Stat. 2136 with § 1503(2), 98 Stat. 2182. That Congress has occasionally used the phrase "accidental use" and has often used the phrases "intentional use" and "willful use" demonstrates that "use," like most verbs, does not encompass any particular mental state, and that (unless the context indicates otherwise) a mental state must be specified if the speaker wishes to narrow the conduct at issue. There is no such specification in 18 U.S.C. 16.

d. There may be statutes in which Congress has criminalized the "use" of a thing without including a *mens rea* element, and as to which courts would nevertheless infer such an element, on the theory that strict-liability offenses are disfavored. See *Staples* v. *United States*, 511 U.S. 600, 606 (1994). That principle does not apply here, because 18 U.S.C. 16 does not define a crime; it merely classifies crimes that have been defined elsewhere.[11] While there is a basis for the presumption

[11] Classifying an offense as a "crime of violence" under Section 16 has a number of consequences beyond the immigration context. For example, Congress has criminalized certain conduct undertaken in the course of committing a crime of violence, see 15 U.S.C. 1245(b) (possession or use of ballistic knife); PROTECT Act, Pub. L. No. 108-21, Tit. VI, § 601, 117 Stat. 686 (to be codified at 18 U.S.C. 25(b)) (use of minor); it has criminalized certain conduct undertaken by someone who has been convicted of a crime of violence, see James Guelff and Chris McCurley Body Armor Act of 2002, Pub. L. No. 107-273, Div. C, Tit. I, § 11009(e)(2)(A), 116 Stat. 1821 (to be codified at 18 U.S.C. 931(a)) (possession of body armor); and it has criminalized certain conduct that has as an element the commission, attempted commission, or intended commission of a crime of violence, see 18 U.S.C. 521(c)(2) (criminal street gangs); 18 U.S.C. 842(p) (distribution of information relating to explosives, destructive devices, and weapons of mass destruction); 18 U.S.C. 1952(a) (travel in aid of racketeering); 18 U.S.C. 1956(a) (money laundering); 18 U.S.C. 1959(a) (violent crime in aid of racketeering); 18 U.S.C. 2261(a) (interstate domestic violence); 21 U.S.C. 841(b)(7)(A) (distribution of controlled substance). The classification of an offense as a crime of violence under Section 16 also has consequences for, among other things, pre-trial detention, 18 U.S.C. 3142(f) and (g); extradition, 18 U.S.C. 3181(b); witness relocation and protection, 18 U.S.C. 3521(a)(1) and (b)(1)(G); sentencing, see 18 U.S.C. 3561(b) (domestic-violence offender); 18 U.S.C. 3663A(c) (mandatory restitution); 28 U.S.C. 994(h) (career offender); juvenile-delinquency proceedings, 18 U.S.C. 5032, 5038(d) and (f); the arrest authority of the Capitol Police, 40 U.S.C. 212a, 212a-3(a) (2000 & Supp. I 2001) (to be recodified at 2 U.S.C. 1961(a) and 1967(a)); and the collection of DNA samples from prisoners and persons on probation, supervised release, or parole, 42 U.S.C. 14135a.

that Congress does not intend to criminalize conduct undertaken without a culpable mental state, there is no reason to suppose that Congress intended to exclude from the definition of "crime of violence" conduct of that type that has already been criminalized.

In any event, petitioner's offense—driving under the influence and causing injury by the operation of the vehicle—is not a typical strict-liability crime. While a Florida prosecutor need not prove any particular mental state beyond the defendant's intoxication, the offense is viewed by Florida as inherently involving negligence, at the very least. As the Supreme Court of Florida explained in a case involving a violation of another provision of the statute at issue here—driving under the influence and causing *death* by the operation of the vehicle, Fla. Stat. Ann. § 316.193(3)(c)(3)—the Florida Legislature long ago determined that "it is criminal negligence for a person in an intoxicated condition to attempt to drive" and that, "if death results to any person while so doing, *such initial negligence will be imputed to the act itself.*" *State* v. *Hubbard*, 751 So.2d 552, 555 (1999) (quoting *Cannon* v. *State*, 107 So.

360, 362 (Fla. 1926); emphasis added by court). Likewise, in a case involving Section 316.193(3)(c)(3)'s predecessor, Fla. Stat. Ann. § 860.01(2) (West 1977) (repealed 1986), the Supreme Court of Florida observed that the offense is not a "classic strict liability" crime, because "the act of operating a motor vehicle while intoxicated involves culpability"—indeed, culpability amounting not merely to negligence but to "reckless[ñess]." *Baker* v. *State*, 377 So.2d 17, 20 (1979). Thus, even if 18 U.S.C. 16 excluded strict-liability crimes, drunk driving resulting in injury would still be a crime of violence.

2. The fact that "attempted use" and "threatened use" require intent does not mean that "use" does

Under 18 U.S.C. 16(a), an offense is a crime of violence if it has as an element "the use, attempted use, or threatened use" of physical force against the person or property of another. In addition to arguing that the word "use," by definition, requires intent, petitioner contends that, because "attempted use" and "threatened use" require intent, "use" should be interpreted to require the same *mens rea*. Pet. Br. 15; accord NACDL Br. 17 & n.4. Petitioner is mistaken.

The fact that an attempt or threat requires intent does not mean that the *object* of the attempt or threat can only be done intentionally. That is perhaps most obviously the case when the object is murder. As this Court has explained, "a murder may be committed without an intent to kill," even though "an attempt to commit murder requires a specific intent to kill." *Braxton* v. *United States*, 500 U.S. 344, 351 n.* (1991) (quoting 4 Charles E. Torcia, *Wharton's Criminal Law* § 473, at 572 (14th ed. 1981)). If the "attempted use" and "threatened use" of force require intent, therefore,

it is because of the nature of an "attempt" and a "threat" (which ordinarily cannot be unintentional), not because of the nature of "use" (which ordinarily can). As a matter of policy, moreover, requiring specific intent for an attempt or threat but not for the underlying crime can be justified on the ground that an attempt or threat does not require that the underlying crime be completed.

Under petitioner's view, the phrase "murder or attempted murder," cf. 18 U.S.C. 1114 ("kills or attempts to kill"), would mean "*intentional* murder or attempted murder," because attempted murder requires an intent to kill and that requirement would be read into the term "murder," thus excluding felony murder and any other form of murder that does not require an intent to kill. That interpretation is self-evidently incorrect. And petitioner's interpretation of Section 16(a) is equally incorrect.[12]

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[12] In support of the theory that 18 U.S.C. 16 requires intent, petitioner's amici make a number of arguments based on legislative history. Each is without merit. Contrary to their assertion (NACDL Br. 19), for example, a statement in a House Report on the meaning of the term "physical action" in a bill that never became law, see H.R. Rep. No. 1396, 96th Cong., 2d Sess. 14 (1980), has no bearing on the meaning of the word "use" in 18 U.S.C. 16. And regardless of whether the offenses in the definition of "crime of violence" in the District of Columbia Court Reform and Criminal Procedure Act of 1970 (DC-CRCPA), Pub. L. No. 91-358, § 210, 84 Stat. 650, "require[] intent," as amici contend (NACDL Br. 19), that definition did not serve as the "model[]" for 18 U.S.C. 16, as another amicus contends (MIHRC Br. 6), since Section 16 consists of general definitions without mentioning any specific offenses, while the DC-CRCPA lists specific offenses without providing any general definition. Nor, contrary to amici's contention (NACDL Br. 18), is there any statement in the legislative history that offenses constituting "crimes of violence" in Section 16 are

B. The Offense Of Drunk Driving Resulting In Injury Necessarily Entails The Use Of "Physical Force" Against A Person

Petitioner's next contention is that, even if 18 U.S.C. 16(a) does not require that the "use" of force be intentional, the offense of which he was convicted still is not a crime of violence under Section 16(a), because "physical force" is not an element of the offense. Petitioner recognizes that "a typical DUI with injury," like petitioner's offense, involves "an intoxicated driver whose vehicle hits another vehicle" or a pedestrian, and that such a "typical" case necessarily entails the application of physical force. Pet. Br. 28. He argues, however, that there are "plausible situations" in which "physical injury is caused by the operation of a vehicle by an intoxicated driver[] without the use of any physical force," *ibid.*, and that, in the words of his amici, "the statute can [therefore] be violated without any 'use of force,'" NACDL Br. 13. Petitioner is mistaken. When a drunk driver causes serious bodily injury with his vehicle, he has necessarily used physical force. "[O]perat[ing] a vehicle[] and * * * by reason of such operation[] caus[ing] * * * [s]erious bodily injury to another," Fla. Stat. Ann. § 316.193(3)(c)(2), thus constitutes "the use * * * of physical force against the person or property of another," 18 U.S.C. 16(a).[13]

Petitioner and his amici provide two basic examples of a case in which (according to them) a person can violate the Florida statute without using physical force. The first situation is one in which a drunk driver swerves; a pedestrian, or another vehicle, moves out of the way to avoid being hit; in so doing, the pedestrian falls down (or suffers a heart attack), or the other vehicle crashes (though not into the defendant's car); and the victim suffers serious bodily injury as a result. Pet. Br. 28; NACDL Br. 13-14. In that situation, according to petitioner and his amici, there has been no physical force because the drunk driver's car did not touch the victim. Pet. Br. 28; NACDL Br. 13. The second situation is one in which the drunk driver stops his car in a place where it should not be stopped—on a highway, for example—and the victim suffers serious

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"essentially the same" as the "crimes of violence" listed in the DC-CRCPA. Instead, the Senate Report on which amici rely says that the offenses set forth in a statutory provision that governs detention hearings, 18 U.S.C. 3142(f)(1)—namely, "crimes of violence, offenses punishable by life imprisonment or death, [and] offenses for which a maximum 10-year imprisonment is prescribed in [certain controlled-substances laws]"—are, collectively, "essentially the same categories of offenses" described in the DC-CRCPA by the terms "dangerous crime" and "crime of violence." S. Rep. No. 225, 98th Cong., 1st Sess. 20 (1983).

[13] Under Section 16(a), the use of physical force is "an element" if the offense necessarily entails such use; the statute need not provide, and the jury need not be instructed, that "the use of physical force" is an element of the offense. See *Chrzanoski* v. *Ashcroft*, 327 F.3d at 193 n.9 (assuming without deciding that this is so). If it were otherwise, the use of physical force would not be an element of (for example) the offense of "[a]ssault by striking, beating, or wounding," 18 U.S.C. 113(a)(4), a result that Congress obviously could not have intended, see S. Rep. No. 225, *supra*, at 307 (Section 16(a) covers threatened or attempted simple assault or battery). Cf. *Rutledge* v. *United States*, 517 U.S. 292, 297-300 (1996) (agreement is element of offense of continuing criminal enterprise, which requires proof that defendant acted "in concert" with others); *Ball* v. *United States*, 470 U.S. 856, 861-864 (1985) (possession of firearm is element of offense of receipt of firearm by felon, which requires proof that defendant "received" firearm). The briefs of petitioner and his amici do not suggest any disagreement with this view.

bodily injury when he crashes into the drunk driver's car. Pet. Br. 29; NACDL Br. 13. Petitioner and his amici apparently take the view that there has been no physical force in that situation because the drunk driver's car was motionless at the time of impact. Pet. Br. 29-30; NACDL Br. 13. Contrary to the contentions of petitioner and his amici, each of these examples does in fact entail the use of "physical force."

As a noun, "force" means "power, violence, compulsion, or constraint exerted upon or against a person or thing." *Webster's Third New International Dictionary*, *supra*, at 887. As a verb, "force" means "to constrain or compel by physical, moral, or intellectual means." *Ibid.* Accordingly, "physical force against the person or property of another," 18 U.S.C. 16(a), is the exertion of power, violence, compulsion, or constraint, by physical means, against (though not necessarily upon) a person or his property. It is to be distinguished from non-physical power or compulsion—for example, "moral suasion" or "the force of argument."

If a drunk driver swerves and thereby causes a pedestrian (or another driver) to jump (or swerve) out of the way to avoid being struck, the drunk driver is exerting power and compulsion against the victim. Force does not require a collision. See *Dickson* v. *Ashcroft*, 346 F.3d 44, 49-50 (2d Cir. 2003). Indeed, the conduct described by petitioner and his amici is routinely described as "forcing" a pedestrian or vehicle off the sidewalk or street. See, *e.g.*, *Edwards* v. *State*, 462 So.2d 581, 583 (Fla. Dist. Ct. App.), review denied, 475 So.2d 694 (Fla. 1985). And the conduct is carried

out by physical means: the propulsion of a machine weighing thousands of pounds.[14]

As for the drunk driver who stops his car on a highway or other well-traveled location where it should not be, he has placed a dangerous obstacle in the path of an unsuspecting driver whom he has caused to collide with the obstacle. Such a defendant has thereby exerted power, by physical means, against the victim. It would not make sense to say that the use of physical force includes hitting a person with an object but not placing the object where the person can be expected to hit it himself, particularly since a battery or murder could be carried out by either method.[15]

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[14] While the edition of *Black's Law Dictionary* that was current at the time of Section 16's enactment defined "physical force" as "[f]orce applied to the body," *Black's Law Dictionary*, *supra*, at 1032, the current edition correctly recognizes that the adjective "physical" refers to the means by which the force is exerted, not the object of its exertion, see *Black's Law Dictionary* 673 (8th ed. 2004) ("physical force" means "[f]orce consisting in a physical act").

[15] *Barrington* v. *State*, 199 So. 320 (Fla. 1940), the Supreme Court of Florida decision on which petitioner relies (Pet. Br. 29-30), does not support the view that a defendant of this type has not used physical force. In rejecting a sufficiency-of-the-evidence challenge to the conviction of a drunk driver whose victim collided with a car the defendant had parked on a highway, the court held that the defendant had caused death by the "operation" of his car because he had "left it an obstacle in the path of other automobiles" and had "placed it in such a position on the highway that it became a menace to moving traffic." 199 So. at 322-323. That apt description of the defendant's conduct is consistent with the view that he used physical force against his victim.

II. PETITIONER'S VIOLATION OF FLA. STAT. ANN. § 316.193(3)(c)(2) IS ALSO A CRIME OF VIOLENCE UNDER 18 U.S.C. 16(b)

A. By Its Nature, Drunk Driving Resulting In Injury Involves A Substantial Risk That Physical Force Against The Person Or Property Of Another May Be Used In The Course Of Committing The Offense

Wholly apart from Section 16(a), petitioner's offense is a crime of violence under Section 16(b). Subsection (b) defines "crime of violence" as "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." The Florida offense indisputably satisfies the "felony" requirement. See Fla. Stat. Ann. § 316.193(3)(c)(2). And even if a person could be said to use "physical force against the person or property of another" only when he drives into another vehicle, person, or thing, but see Point I.B, *supra*, the offense of drunk driving resulting in injury, "by its nature," involves "a substantial risk" of the use of such force "in the course of committing the offense." In every case in which a person not only drives under the influence but operates his vehicle in such a way that he causes "serious bodily injury"—defined by Florida statute as "a physical condition that creates a substantial risk of death, serious personal disfigurement, or protracted loss or impairment of the function of any bodily member or organ," Fla. Stat. Ann. § 316.1933(1)(b) (West Supp. 2004)—there is a "substantial risk" that the defendant will drive into another vehicle, person, or thing.

In the great majority of cases in which a person engages in the conduct prohibited by the Florida

statute, there is not merely a "substantial risk" that the defendant will drive into another vehicle, person, or thing; he will in fact have done so. That is the "typical" drunk-driving-with-injury offense, Pet. Br. 28, of which petitioner's is an example. In the few remaining cases—those in which a person causes serious bodily injury without actually driving into another vehicle, person, or thing—the drunk driver's conduct involves a substantial risk that there will be such a collision. Any defendant who not only drives drunk but also "swerves off the road, causing a pedestrian to dive into a ditch and become seriously injured," Pet. Br. 28, or has a "near miss [that] causes a heart attack," *ibid.*, or has his car struck after stopping it "in harm's way, for example, alongside a highway median or opposite oncoming traffic," NACDL Br. 13, is driving in such a way that there is a "substantial risk" that he will crash into another vehicle, person, or thing. Virtually by definition, a "near miss," Pet. Br. 28, involves a substantial risk of a hit.

Petitioner does not dispute this point, and his amici affirmatively concede it. See NACDL Br. 24 ("drunken driving entails a risk of injury-causing impact" and "this risk is clearly substantial in those cases where injury-causation is an element of the offense"). Their only objection to the view that petitioner's offense is a crime of violence under Section 16(b) is that the "use" of force of which there must be a substantial risk means the intentional use of force. See NACDL Br. 23-27. But there is no merit to that objection, for the same reasons that the "use" of force in Section 16(a) does not require volitional conduct. See Point I.A, *supra*.

B. The Question Whether Drunk Driving Resulting In Injury Is A Crime Of Violence Under 18 U.S.C. 16(b) Is Properly Before The Court And Should Be Answered If The Court Determines That The Offense Is Not A Crime Of Violence Under 18 U.S.C. 16(a)

In holding that the Florida offense of which petitioner was convicted is a crime of violence under 18 U.S.C. 16, both the BIA and the court of appeals followed the Eleventh Circuit's earlier decision in *Le*. J.A. 106-107, 117. *Le* held that the Florida offense is a crime of violence under Section 16(a), without reaching the question whether it is a crime of violence under Section 16(b). 196 F.3d at 1354. Petitioner has addressed the question whether Section 16(b) applies to the Florida offense, insofar as he contends that the meaning of "use" is the same in both subsections. See Pet. Br. 18-23. And while petitioner has not directly addressed the question whether the offense satisfies the "substantial risk" component of Section 16(b), cf. *id.* at 19 n.5, he has not suggested any impediment to this Court's resolution of the issue, see *id.* at 7. Petitioner's amici, however, contend that, because the issue was not addressed below, "this Court—in the event it agrees that [the] Florida [offense] does not fall within § 16(a)—should not itself evaluate in the first instance whether [the offense] is a 'crime of violence' under § 16(b)." NACDL Br. 21. Petitioner's amici are mistaken.

1. As an initial matter, there is no procedural bar to the Court's consideration of the issue. The question on which the Court granted certiorari is whether the Florida offense is a crime of violence "under 18 U.S.C. § 16," Pet. i, and whether it is a crime of violence under Section 16(b) is "fairly included therein," Sup. Ct. R. 14.1(a). In any event, a respondent "may rely upon any matter appearing in the record in support of the judgment below," *Blum* v. *Bacon*, 457 U.S. 132, 137 n.5 (1982), and the type of crime that drunk driving resulting in injury is "by its nature," 18 U.S.C. 16(b), is a pure question of law that can necessarily be decided on the basis of the record in this case. The fact that the Section 16(b) argument was not raised in the court of appeals, especially given the Eleventh Circuit precedent "squarely h[o]ld[ing]" that the Florida offense is a crime of violence under Section 16(a), J.A. 117, does not prevent the Court from affirming on this alternative ground. See *Schweiker* v. *Hogan*, 457 U.S. 569, 585 n.24 (1982).

That there is no procedural bar to deciding the issue does not mean, of course, that the Court is obligated to do so. If it were to determine that the Florida offense is not a crime of violence under Section 16(a), the Court could decline to consider the applicability of Section 16(b) as a matter of discretion. But addressing the issue would be the better course, because the question whether an offense like the one at issue here is a crime of violence under Section 16(b) has divided the lower courts,[16] and that division would persist if the Court decided that the Florida offense is not a crime of violence under Section 16(a) and declined to consider whether it is a crime of violence under Section 16(b). This case therefore satisfies even the stringent stan-

[16] Compare *Bazan-Reyes* v. *INS*, 256 F.3d 600 (7th Cir. 2001) (Wisconsin offense of homicide by intoxicated use of vehicle is not crime of violence) and *United States* v. *Trinidad-Aquino*, 259 F.3d 1140 (9th Cir. 2001) (California crime of driving under the influence with injury to another is not crime of violence) with *Omar* v. *INS*, 298 F.3d 710 (8th Cir. 2002) (Minnesota crime of vehicular homicide is crime of violence).

dard suggested in *United States* v. *Nobles*, 422 U.S. 225 (1975): that, in the exercise of its discretion, the Court will consider "alternative grounds for affirmance" if "the issues are of sufficient general importance to justify the grant of certiorari." *Id.* at 242 n.15.

2. It is true, as petitioner's amici note, NACDL Br. 21 n.6, that, in its brief in opposition to the certiorari petition, the government said that "[t]he application of Section 16(b) to petitioner's Florida conviction is an issue that has not been addressed below and, accordingly, should not be reviewed by this Court," Br. in Opp. 8. The government made that statement, however, in the course of arguing that the Court should deny certiorari and await a case in which both subsections of 18 U.S.C. 16 had been addressed by the lower court. Br. in Opp. 7-9. In granting certiorari, the Court rejected the contention that this case was not a suitable vehicle for deciding whether drunk driving resulting in injury is a crime of violence under Section 16, and now that the case is here, the Court should address whatever issues are necessary to provide a definitive and comprehensive answer to that question.

The government also suggested in its brief in opposition that *INS* v. *Ventura*, 537 U.S. 12 (2002) (per curiam), might preclude the Court from deciding whether the Florida offense falls within Section 16(b). Br. in Opp. 8. On reflection, we do not believe that *Ventura* is an obstacle to review. *Ventura* held that the court of appeals, after reversing a BIA decision in favor of the government, should have remanded the case so that any further evidence and legal arguments that might support removal could be considered by the BIA in the first instance. The principle applied in *Ventura* —that "a court of appeals should remand a case to an agency for decision of a matter that statutes place

primarily in agency hands," 537 U.S. at 16—does not apply here, because, as the BIA itself acknowledged in this case, "the meaning of the term 'crime of violence' under 18 U.S.C. § 16 is a matter of federal criminal law" and the BIA therefore "defer[s] to circuit court interpretations" of Section 16, J.A. 107. Cf. *Crandon* v. *United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring in the judgment) ("a criminal statute[] is not administered by any agency but by the courts"). See generally *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947) (rule of *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943), is that reviewing court may not affirm administrative action on ground not relied upon by agency when court is "dealing with a determination or judgment which an administrative agency alone is authorized to make"). *Ventura* is particularly inapposite because the answer to the question whether the Florida offense is a crime of violence determines the court of appeals' jurisdiction. See J.A. 116 ("[I]f [petitioner] is an alien who is removable based on an aggravated felony conviction, [8 U.S.C.] § 1252(a)(2)(C) divests us of jurisdiction to review the removal order.").

III. THE DEFINITION OF "SERIOUS CRIMINAL OFFENSE" IN 8 U.S.C. 1101(h) DOES NOT SUPPORT THE VIEW THAT THE STATUTORY OFFENSE OF DRUNK DRIVING RESULTING IN INJURY IS NOT A "CRIME OF VIOLENCE" UNDER 18 U.S.C. 16

Title 8 U.S.C. 1182(a) (2000 & Supp. I 2001) lists categories of aliens who are ineligible for visas and for admission to the United States. One such category is aliens who have asserted immunity from prosecution after being charged with the commission of a "serious criminal offense." 8 U.S.C. 1182(a)(2)(E). That term is defined in 8 U.S.C. 1101(h), which was added to Section

1101 in 1990. See Foreign Relations Authorization Act, Fiscal Years 1990 and 1991, Pub. L. No. 101-246, § 131(b), 104 Stat. 31. Under Section 1101(h), a "serious criminal offense" means

> (1) any felony;
>
> (2) any crime of violence, as defined in section 16 of title 18; or
>
> (3) any crime of reckless driving or of driving while intoxicated or under the influence of alcohol or of prohibited substances if such crime involves personal injury to another.

Petitioner contends that this definition's inclusion of both "crime of violence" and drunk driving involving injury demonstrates that an offense like the one at issue here is not a crime of violence. Otherwise, he says, there would have been no reason to include Section 1101(h)(3). Pet. Br. 34-36. Accord NACDL Br. 20 n.5; MIHRC Br. 8-11. This contention is without merit.

As an initial matter, what petitioner is asking the Court to do, in essence, is to defer to what he contends is the 101st Congress's interpretation in 1990 of a statute passed by the 98th Congress in 1984. See Pet. Br. 35 ("as of February 1990, Congress believed that DUI offenses that cause injury are not within 'crimes of violence' defined in 18 U.S.C. § 16"). Even if the 101st Congress interpreted Section 16 as petitioner contends, "the opinion of this later Congress as to the meaning of a law enacted [more than five] years earlier does not control the issue," *Mackey* v. *Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 839 (1988), because, as this Court has "often observed," the views of a later Congress "form a hazardous basis for inferring the intent of

an earlier one," *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 355 (1998) (quoting *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 348-349 (1963)). See, *e.g.*, *United States* v. *Texas*, 507 U.S. 529, 535 n.4 (1993); *Mackey*, 486 U.S. at 839-840 & n.15.

In any event, interpreting 18 U.S.C. 16 to include the Florida offense at issue here does not in fact render 8 U.S.C. 1101(h)(3) "superfluous," Pet. Br. 35; MIHRC Br. 9, or "wholly unnecessary," NACDL Br. 20 n.5. As explained below, if the Florida offense is a "crime of violence," and thus a "serious criminal offense" under both Section 1101(h)(2) and Section 1101(h)(3), there are still drunk-driving crimes, in Florida and elsewhere, that qualify as a "serious criminal offense" under Section 1101(h)(3) but not under Section 1101(h)(2).

Under subsection (h)(3), a "serious criminal offense" is any crime of driving while intoxicated or under the influence "if such crime involves personal injury to another." All that subsection (h)(3) requires is that the particular episode of drunk driving in fact involved personal injury to another. Unlike Section 16(a), it does not require that the statutory offense have personal injury to another "as an element"; and unlike Section 16(b), it does not require that the crime involve personal injury to another "by its nature." That the injury requirement is case-specific rather than categorical is confirmed by the fact that subsection (h)(3) is aimed at misdemeanors (since subsection (h)(1) covers "any felony") and the statutory offense of drunk driving with injury is ordinarily a felony in the States that have one. See note 4, *supra*.

Suppose, then, that a person commits the simple misdemeanor offense of "driving while intoxicated or under the influence of alcohol," and that, in that particular case, "such crime involves personal injury to

another." 8 U.S.C. 1101(h)(3). That person will have committed a "serious criminal offense" under Section 1101(h)(3). But he will not have committed a "crime of violence" under Section 16(a), because the offense does not have "as an element" the use, attempted use, or threatened use of physical force (even under the broadest possible understanding of those terms), and he will not have committed a "crime of violence" under Section 16(b), because (at a minimum) the offense is not "a felony." Accordingly, if the statutory offense of drunk driving resulting in injury is a crime of violence under Section 16, as the government contends, Section 1101(h)(3) is still necessary in order for the definition of "serious criminal offense" to capture the simple misdemeanor offense of drunk driving in cases in which the drunk driver causes injury. Such cases will arise when the crime occurs in a State that does not have a statutory offense of drunk driving resulting in injury and when it occurs in a State that does have such an offense but the defendant is charged with a lesser one.

Finally, even if the 101st Congress's view of the meaning of a statutory term enacted by the 98th Congress were relevant, and even if 8 U.S.C. 1101(h)(3) covered only the statutory offense of drunk driving resulting in injury, it still would not follow that 18 U.S.C. 16 should be interpreted to exclude that offense. Even under those circumstances, the 101st Congress might have enacted Section 1101(h)(3), not because it believed that Section 16 does not cover the offense of drunk driving with injury, but because it was uncertain whether courts would interpret the provision that way, and it wanted to be sure that the offense would be included in the definition of "serious criminal offense." Cf. *Mackey*, 486 U.S. at 839 (statute might have been amended, not because Congress thought statute as

originally enacted had a different meaning, but because Congress "thought that some courts had erroneously construed" it).

In this regard, it bears emphasis that there would be considerable overlap in Section 1101(h) even if petitioner's view were correct. Since subsection (h)(1) covers "any felony," a substantial proportion of crimes of violence under Section 16(a), and all crimes of violence under Section 16(b), are captured by both Section 1101(h)(1) and Section 1101(h)(2). And even if the felony offense of drunk driving resulting in injury were not a crime of violence, it would still be covered by both Section 1101(h)(1) and Section 1101(h)(3). It thus appears that, in enacting Section 1101(h), Congress was seeking to ensure that no serious criminal offense would slip through the cracks, even at the expense of redundancy.[17]

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[17] As additional support for their argument that drunk driving resulting in injury is not a crime of violence, petitioner's amici invoke the rule of lenity. NACDL Br. 27-28; CIEJ Br. 23-27. But they misstate the rule. It does not apply whenever there is "any ambiguity" in the language of a statute, NACDL Br. 27, much less whenever there is "any *possible* ambiguity," CIEJ Br. 27 (emphasis added). As this Court has emphasized, "[t]he simple existence of *some* statutory ambiguity * * * is not sufficient to warrant application of th[e] rule, for most statutes are ambiguous to some degree." *Muscarello* v. *United States*, 524 U.S. 125, 138 (1998) (emphasis added). If the law were otherwise, the rule would be tantamount to one that "automatically permits a defendant to win." *Id.* at 139. Instead, what is required is a "*grievous* ambiguity," such that, at the end of the interpretive process, the Court can still make "no more than a guess" as to what Congress intended. *Id.* at 138-139 (quoting *Staples* v. *United States*, 511 U.S. 600, 619 n.17 (1994), and *United States* v. *Wells*, 519 U.S. 482, 499 (1997); emphasis added). That standard is not satisfied here, and petitioner's amici do not suggest that it is.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 03-583

IN THE

Supreme Court of the United States

JOSUE LEOCAL,

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v.

JOHN D. ASHCROFT, UNITED STATES ATTORNEY GENERAL, AND IMMIGRATION AND NATURALIZATION SERVICE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF FOR PETITIONER

INTRODUCTION

The decisions of the Eleventh Circuit in this case and the predecessor case on which it relied, *Le v. Attorney General*, 196 F.3d 1352 (11th Cir. 1999) (per curiam), were based on an interpretation of 18 U.S.C. § 16 that is contrary to the interpretations by a majority of circuits that have considered the issue -- specifically, whether DUI offenses involving injury are crimes of violence. Respondents have not addressed the rationale of those decisions that support the interpretation petitioner advocates, nor have they endorsed the reasoning of the *Le* decision or other courts that have adopted a contrary approach. Without acknowledging the split among the circuits on the interpretation of the phrase "use of physical force against" in § 16, respondents engage in close linguistic analysis of the word "use" to support the proposition that crimes of violence do not require intentional conduct. This exercise, petitioner submits, is one of

obfuscation and not clarification of the issue before the Court.

The cases that address § 16(a)'s applicability to DUI offenses either state summarily that § 16(a) is clearly inapplicable, *see e.g. United States v. Lucio-Lucio*, 347 F.3d 1202, 1203 (10th Cir. 2003); *Francis v. Reno*, 269 F.3d 162, 166 (3d Cir. 2001); *Bazan-Reyes v. INS*, 256 F.3d 600, 609 (7th Cir. 2001), or provide little analysis as to why it should apply to DUI offenses. *See Le,* 196 F.3d 1352; *United States v. Santana-Garcia*, 211 F.3d 1271, 2000 WL 491510 (6th Cir. Apr. 18, 2000) (unpublished table decision). There are, however, numerous cases that have considered whether DUI offenses (ranging from simple DUI to DUI manslaughter) qualify as crimes of violence under § 16(b) or the analogous language in the Sentencing Guidelines. *Compare United States v. Vargas-Duran,* 356 F.3d 598 (5th Cir.) (en banc), *cert. denied*, 124 S. Ct. 1728 (2004) and *pet. for cert. pending* No. 03-1514 (filed May 7, 2004); *United States v. Trinidad-Aquino*, 259 F.3d 1140 (9th Cir. 2001); *Dalton v. Ashcroft*, 257 F.3d 200 (2d Cir. 2001); *Bazan-Reyes,* 256 F.3d 600*; with Omar v. INS*, 298 F.3d 710 (8th Cir. 2002). Respondents have all but ignored these decisions and their interpretation of the concept of "use of physical force." Without confronting the reasoning of the courts that have concluded that the intentional use of physical force is a requirement for a crime of violence under § 16, respondents assert that the use of physical force may, but will not necessarily, involve intentional conduct.

By engaging in narrow linguistic analysis regarding what the word "use" means and whether certain scenarios constitute the "use of physical force against" a person or property, respondents have failed to consider § 16's context -- that is, it was enacted to classify offenses as "crimes of violence" not just to provide a catch-all definition for almost any offense. Respondents have also ignored the implications

of the position they advocate. Adoption of respondents' interpretation of § 16 would improperly expand the term "crime of violence" to cover certain offenses that require only negligent conduct. That, in turn, would lead to their classification as aggravated felonies, subjecting an individual to mandatory and permanent removal from the United States based on conviction for an offense that might involve only criminal negligence and a suspended sentence of one year. Petitioner submits that such a result is not consistent with Congressional intent.

Finally, respondents have not categorically demonstrated that all convictions under Fla. Stat. § 316.193(3)(c)(2) require proof of the "use of physical force." Therefore, the fact that the "use of physical force" is not "an element" of this offense, as required by § 16(a), is yet another reason why petitioner's offense is not a "crime of violence" under § 16.

ARGUMENT

I. IN THE CONTEXT OF 18 U.S.C. § 16, "USE OF PHYSICAL FORCE" REFERS TO INTENTIONAL CONDUCT

A. The Plain and Ordinary Meaning of "Use" Connotes Intentional Action, Not an Accident

Respondents have cited certain dictionary definitions of "use" that arguably do not include an intent element as support for their argument that "use" does not have a *mens rea* component. Resp. Br. at 13-15. In so doing, respondents ignore the importance of determining Congressional intent regarding § 16's meaning by applying, first and foremost, the plain and ordinary meaning of the statute's text. *See Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985). Because almost any word

will have more than one dictionary definition and thus may have more than one meaning, Congress is presumed to use a word with its most commonly accepted meaning. *See Bailey v. United States*, 516 U.S. 137, 143-45 (1995) (stating that "the word 'use' poses some interpretational difficulties because of the different meanings attributable to it" but then applying the "ordinary and natural" meaning); *Mallard v. U.S. Dist. Ct. for the S. Dist. of Iowa*, 490 U.S. 296, 301 (1989) (discussing other ways the word "request" may be used, but noting "[t]here is little reason to think that Congress did not intend [for the word] to bear its most common meaning").

Respondents effectively acknowledge that the definitions of "use" relied on by petitioner indicate that "use" ordinarily refers to intentional rather than accidental conduct. Resp. Br. at 13. Respondents emphasize this fact by noting dictionary definitions of "use" that mean to put something into service "*especially* to attain an end" and "*usu[ally]* for an intended . . . purpose." *Id.* (emphasis in original). Therefore, even according to respondents, "use" normally and ordinarily involves intentional or non-accidental conduct, though not necessarily all the time.

But respondents then go further. Based on selected definitions from different dictionary editions, respondents assert that "one could reasonably infer . . . that the employment of something for a purpose is not even the *primary* definition of 'use,' much less the sole one." Resp. Br. at 14 (emphasis in original). This argument highlights respondents' narrow approach to § 16. As an initial matter, the argument misconstrues petitioner's position: not that "use" always and everywhere refers to intentional conduct, but that the "ordinary and common" understanding of the word "use" in this statutory context (*see* § I.B., *infra*)

supports the conclusion that "use" means intentional conduct in § 16.[1]

Moreover, the argument that the primary definition of "use" does not include intent lacks merit for two reasons. First, at least one of the dictionary definitions respondents cite includes an element of intent. Respondents cite the third definition from *Webster's Third New International Dictionary* stating that "use" means "to put into action or service." Resp. Br. at 14. Putting something into "service" naturally and commonly is understood to include intent. People do not ordinarily obtain a service from something accidentally. Second, the *primary* definition of "use" in many dictionaries involves "purpose" and, thus, intent. For example, respondents focus on the sixth and seventh definitions of the verb "use" from the *Oxford English Dictionary* (Resp. Br. at 14), but they ignore the *first definition* of the noun "use" from that same dictionary (both the version in effect today and as of 1984) which is: "[t]he act of employing a thing for any (esp. a profitable) purpose." *The Oxford English Dictionary* 350 (2d ed. 1989); *The Oxford English Dictionary* 468 (1978). Respondents also ignore the first definitions of the noun and verb "use" in *The American Heritage Dictionary* (both the current version and the one in effect in 1984), which include employing something for a purpose, thus connoting intent. *The American Heritage Dictionary* 1894 (4th ed. 2000); *The American Heritage Dictionary* 1410 (1981).

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[1] Respondents imply that petitioner believes that "use" must be interpreted to involve intent in every circumstance, no matter the context, such that "use" could never be meant to include accidental conduct. Resp. Br. at 17-18. This is, of course, not the case. Petitioner's brief makes clear that the ordinary meaning of "use" requires intent, not that "use" always does so. Moreover, this argument is made in the context of § 16's specific language and context, not in the context of defining "use" for all purposes or contexts.

In sum, although not every dictionary definition of the noun or verb "use" includes an intent component, the proper focus is on whether the common, ordinary and everyday meaning of "use" does. *See generally Muscarello v. United States*, 524 U.S. 125, 130-31 (1998) (noting that "carry" has "other meanings" but focusing on the "ordinary" meaning of the word); *Mallard*, 490 U.S. at 301 (the fact that the word "request" may be used in various ways, does not change its "ordinary and natural signification"). Under this standard, "use" connotes intentional conduct, especially given the statutory context.

B. The Statutory Context Supports a Reading of "Use" with a *Mens Rea* Component

Respondents contend that there is no basis for limiting the interpretation of the word "use" in § 16 to intentional conduct, and that narrowing the conduct "use" encompasses by requiring a particular mental state must be expressly specified in the statute (*e.g.*, "accidental use," "intentional use" or "willful use"). Resp. Br. at 20. Because "use" can encompass both intentional and accidental conduct with an appropriate modifier, respondents assert that the word is not limited to intentional conduct unless that mental state is expressly specified in the statute, and note that there is no such specification in § 16. *Id.* Respondents recognize that there may be an exception to the asserted "requirement" that *mens rea* be specified in the statute if "the context indicates otherwise," *id.*, but they have taken no account of the statutory context under consideration, *i.e.*, whether DUI with serious bodily injury under Fla. Stat. § 316.193(3)(c)(2) is a "crime of violence" under § 16.

In *Bailey v. United States*, this Court noted that understanding what Congress meant by the term "use" depends in part on the statute in which the word appears. ""Use' draws meaning from its context, and we will look not only to the word itself, but also to the statute and the

sentencing scheme, to determine the meaning Congress intended." 516 U.S. at 143. Because § 16 categorizes certain types of crimes -- violent crimes -- it therefore excludes from the definition certain types of conduct that may nevertheless be criminal. Put another way, not every crime is a "crime of violence." The concept of a "crime of violence" is not a common law term, but was introduced into the federal criminal code through the Comprehensive Crime Control Act of 1984 to designate a category of serious crimes based on the physical force involved. Pub. L. No. 98-473, § 1001(a), 98 Stat. 1837, 2136 (1984). The term referred to certain crimes designated as particularly severe that would subject perpetrators to harsher treatment. *See e.g. United States v. Lucio-Lucio*, 347 F.3d 1202, 1205 (10th Cir. 2003) (referring to crimes of violence as "especially heinous offenses"). The legislative history cites to the following offenses as examples of what would constitute a crime of violence for each subsection of § 16: for subsection (a), assault, and for subsection (b), burglary. S. Rep. No. 98-225, at 307, (1983) *reprinted in* 1984 U.S.C.C.A.N. 3182, 3486-87. Both of these clearly involve intentional conduct.

Section 16's statutory context indicates that the force required for a crime of violence must be violent in nature, and that criminal negligence does not suffice. *See Ye v. INS*, 214 F.3d 1128, 1133-34 (9th Cir. 2000) (alien's conviction for vehicle burglary did not constitute a crime of violence because, following the categorical approach, the physical force needed to enter a locked car with intent to commit a theft is not necessarily violent in nature). Similarly, in *United States v. Doe*, 960 F.2d 221 (1st Cir. 1992) (Breyer, J.) the court held that a conviction for being a "felon in possession of a firearm" did not constitute a "violent felony" for purpose of sentence enhancement because simple possession of a firearm, even by a felon, takes place in a variety of ways, many of which do not involve likely accompanying violence. "There is no reason to believe

Congress meant to enhance sentences based on, say, proof of drunken driving convictions. Rather, we must read the definition in light of the term to be defined, 'violent felony' which calls to mind a tradition of crimes that involve the possibility of more closely related, active violence." *Id.* at 225.

Here, the statutory context strongly indicates that the term "use of physical force" must be an intentional use of force. One can cause injury to the person or property of another as a result of operating a vehicle while under the influence of alcohol in a manner that is not violent in nature. Many types of accidents resulting from driving under the influence, *e.g.*, running a stop sign or crossing into another lane, entail the application of physical force against the person or property of others, but it would be anomalous to label such accidents as violent crimes.

Further context supporting an intent requirement is provided by the inclusion of "attempted use" and "threatened use" in § 16(a). Respondents' argument that even though "attempted use" and "threatened use" involve intentional conduct, simple "use" need not (Resp. Br. at 22-23), is strained and unpersuasive. The suggestion that petitioner's interpretation of § 16(a) would not accommodate the concept of felony murder is not only wrong, but beside the point. Felony murder is a concept of liability for a death that is an unintended result, but proximately caused by felonious conduct. Even though the death may not be intended, liability is attributed to the felon when his conduct is the proximate or legal cause of the death. It does not mean that the death was the result of negligent conduct. For example, an arsonist who sets fire to a house resulting in the death of an inhabitant could be charged with felony murder even though he did not intend to kill anyone when he set the fire. Thus, to recognize the natural similarity in meaning from the

parallel construction in § 16(a) in no way undermines the viability of the concept of felony murder.

Even when it is possible to refer to the accidental or inadvertent use of something (Resp. Br. at 17-18),[2] the ordinary and common meaning of the word in its statutory context should govern unless clearly specified otherwise. There is a "distinction between how a word *can be* used and how it *ordinarily is* used." *Smith v. United States*, 508 U.S. 223, 242 (1993) (Scalia, J., dissenting) (emphasis in original). As a result, it is of little value in interpreting § 16 to consider, as respondents have, other statutes in which "use" is modified by "intentional" and then argue that "use" in § 16 must be accompanied by a modifier to refer to intentional conduct. Resp. Br. at 18-19 & n.10. The focus is on the ordinary meaning of "use" in the context of § 16.

Moreover, the majority of statutes cited by respondents refer to the "willful" use of something, not "intentional" use. Resp. Br. at 19 & n.10. A statute that specifies "willful" use implies a separate element of knowledge regarding the character or source of the thing being "used" in addition to the purposeful availment of the proscribed thing itself. One of respondents' examples, 18 U.S.C. § 708, penalizes those who "willfully use[] as a trade mark, commercial label, or portion thereof . . . the coat of arms of the Swiss Confederation." The prohibited conduct is

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[2] Respondents maintain that the concept "use of physical force" does not necessarily include an intent requirement because the idea of "accidental use of force" is plausible, relying on decisions of the Illinois Court of Appeals and a statutory definition under New York law. Resp. Br. at 18. In fact, the term used by the Illinois court appeared as "an accidental [use of force]," quoting from an earlier Illinois case in which the bracketed phrase replaced the word "shooting," and was used as a contrast to use of force in self-defense, not to describe a negligent use of force or use of force without intent. *People v. Purazzo*, 420 N.E.2d 461, 467 (Ill. App. Ct. 1981), *cited in People v. Walls*, 586 N.E.2d 792, 797 (Ill. App. Ct. 1992) and *People v. Shelton*, 489 N.E.2d 879, 883 (Ill. App. Ct. 1986).

not merely the use of the white-on-red design (which clearly is done intentionally and not accidentally), but the use of the design with the knowledge that it represents the Swiss coat of arms. Similarly, 18 U.S.C. § 1543, which provides criminal penalties for those who "willfully and knowingly use[] . . . any . . . false, forged, counterfeited, mutilated, or altered passport," prohibits the act of using a false passport with the knowledge that the document is forged.

The few statutes cited by respondents that prohibit "intentional" use are also distinguishable. These frequently reflect the use of a thing with the separate purpose of achieving some other goal. For example, respondents cite 21 U.S.C. § 843(b), which makes it unlawful "intentionally to use any communication facility in committing or in causing or facilitating the commission of" a drug offense. Resp. Br. at 19 & n.10. The prohibited conduct is not, for instance, the use of a telephone (which, of course, is an intentional act), but the use of that telephone with the purpose of facilitating a drug transaction. *See United States v. Whitmore*, 24 F.3d 32, 35 (9th Cir. 1994) (per curiam) ("What is essential is that the defendant knows that he or she is using the communication device to facilitate the drug transaction"). Respondents also cite 18 U.S.C. § 2511(1)(b), which imposes criminal liability on "any person who . . . intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication." As the legislative history makes clear, "'[i]ntentional' means more than that one voluntarily engaged in conduct or caused a result. Such conduct or the causing of the result must have been the person's conscious objective." S. Rep. No. 99-541, at 23-25 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3577-79. As a result, "intentionally" requires proof that an individual charged under this statute had the conscious objective to intercept oral communications when he turned on a device; *i.e.*, it excludes those who intentionally turn on a device for some

purpose other than to intercept communications, but nonetheless do intercept them. Given these statutes' differing contexts, they do not change the fact that "use" in § 16 means intentionally applying force.

Respondents' position that "use" encompasses accidental conduct results in a situation in which crimes that require nothing more than negligence and injury for conviction (§ 16(a)), or felonies that pose a substantial risk that someone will be injured through negligence (§ 16(b)), qualify as crimes of violence. Respondents acknowledge that an offense under Fla. Sta. § 316.193(3)(c)(2) involves negligence "at the very least." Resp. Br. at 21. Under this interpretation of "crimes of violence," individuals who have committed offenses that may only involve negligence would be classified as aggravated felons and become permanently removable from the United States on that basis if their sentence was one year. No other offense on the extensive list of aggravated felonies involves a *mens rea* of mere negligence or even recklessness. *See* 8 U.S.C. § 1101(a)(43)(A)-(E), (G)-(U).

II. "USE OF PHYSICAL FORCE" IS NOT AN ELEMENT OF FLA. STAT. § 316.193(3)(c)(2), NO MATTER HOW "USE" OR "FORCE" ARE DEFINED

Respondents do not dispute that for a given offense to satisfy § 16(a)'s "element" requirement, a conviction for that offense must require proof of the "use, attempted use, or threatened use of physical force against the person or property of another." Moreover, they do not contest that, under the categorical approach, the Court looks not to the actual conduct underlying a conviction, but rather to the elements required by the statute at issue. Finally, they do not seem to contest that, as a result of these two requirements, an offense is a "crime of violence" under § 16(a) only if the minimum conduct necessary to maintain a conviction under

that statute includes the "use of physical force against the person or property of another." *See United States v. Vargas-Duran*, 356 F.3d 598, 605 (5th Cir.) (en banc), *cert. denied*, 124 S. Ct. 1728 (2004) and *pet. for cert. pending* No. 03-1514 (filed May 7, 2004) (interpreting the identical "element" language from the Sentencing Guidelines and finding that "[i]f any set of facts would support a conviction without proof of [the component in question, *e.g.*, use of physical force] then the component most decidedly is not an element -- implicit or explicit -- of the crime."); *Chrzanoski v. Ashcroft*, 327 F.3d 188, 195-96 (2d Cir. 2003) (offense is not a "crime of violence" under § 16(a) when the elements of the offense at issue could be satisfied without force being used). Respondents nevertheless assert, without any apparent support, that "[w]hen a drunk driver causes serious bodily injury with his vehicle, he has necessarily used physical force." Resp. Br. at 24. This argument lacks merit for a number of reasons.

First, respondents offer nothing to establish, as they must, that a conviction under Fla. Stat. § 316.193(3)(c)(2) always requires proof of, or necessarily entails, some use of physical force against the person or property of another (no matter how "use" or "force" is defined). Rather, respondents dismiss as "atypical" the real-world examples petitioner and his amici describe, and try to explain how those situations involve the use of physical "force." Resp. Br. at 25-27. Respondents' attempts to sweep those situations under the "use of force" umbrella are unpersuasive. For example, it strains all bounds of ordinary English to contend, as respondents do (Resp. Br. at 27), that someone who stops his or her car on a highway "uses force against" any person who happens to run into that car. Simply because the same legal responsibility may attach from hitting a person with your car and from placing your car where someone may hit it (Resp. Br. at 27), does not mean that both acts involve "using" force.

Moreover, it is not enough to argue that two posited hypotheticals may involve "force." Respondents ignore other real-world situations that could support a conviction under Fla. Stat. § 316.193(3)(c)(2), but involve no force whatsoever. For example, Fla. Stat. § 316.193(3)(c)(2)'s elements of being intoxicated, operating a motor vehicle and causing injury would be satisfied without "force" being used when: (i) an intoxicated driver is operating a four-wheel vehicle off-road; the vehicle never runs into anything but rather gets stuck in the mud in such a way that the tailpipe is submerged leading to carbon monoxide poisoning of the occupants, *see Weese v. Schukman*, 98 F.3d 542, 545-46 (10th Cir. 1996) (describing serious injuries suffered as a result of carbon monoxide poisoning that occurred after an off-road vehicle's tailpipe became submerged in water); or (ii) an intoxicated driver pulls off a street into an alley that runs next to an apartment building, stops his car next to the building's ventilation system and then he falls asleep with the engine running causing occupants to suffer carbon monoxide poisoning. *See Late Local News Briefs*, S. Bend Trib., Aug. 21, 2002 at 2, *available at* 2002 WL 24745065 (describing evacuation of building and serious health effects due to carbon monoxide coming into a building from a car parked outside).

Second, respondents' argument essentially equates "causing injury" (a result or effect) with "using force" (an action or cause). Respondents do not explain how the difference between injury and force (as exemplified by the contrast between § 16(b) and the Sentencing Guidelines (Pet. Br. at 30-34)) can be reconciled under their interpretation of the statute. If Congress intended to focus on the effect of an individual's conduct (injury) as opposed to the cause (use of force) it could have written § 16 in terms of "injury to others" and not "use of physical force against" others.

III. THE LEGISLATIVE HISTORY OF BOTH § 16 AND § 1101(h) SUPPORT THE CONCLUSION THAT DUI CAUSING INJURY TO OTHERS IS NOT A CRIME OF VIOLENCE

Respondents do not argue that § 16's legislative history (related to both its enactment and its incorporation into 8 U.S.C. § 1101(h)) supports their expansive interpretation of § 16. Rather, they attempt to demonstrate that the history does not unconditionally support petitioner's interpretation. This attempt is based on an unfairly narrow parsing of § 16's legislative history that ignores what is obvious from a fair reading of that history (Resp. Br. at 23-24 & n.12), and on nothing more than speculation about Congressional intent in enacting § 1101(h). Resp. Br. at 33-37. These arguments are unpersuasive.

A. Section 16

Respondents' review of § 16's legislative history focuses on whether the offenses listed as "crimes of violence" in the District of Columbia Court Reform and Criminal Procedure Act of 1970 ("DC-CRCPA"), Pub. L. No. 91-358, § 210(a), 1970 U.S.C.C.A.N. (84 Stat.) 764, included the offenses that the 98th Congress understood were the types of offenses that § 16 covered; offenses that respondents tacitly concede require intent but do not include DUI offenses. The legislative history reflects Congress' understanding that the offenses covered by § 16 are "essentially the same categories of offenses" listed in the DC-CRCPA as "dangerous crimes" and "crimes of violence." S. Rep. No. 98-225, at 20-21, (1983) *reprinted in* 1984 U.S.C.C.A.N. 3182, 3203-04. Respondents attempt to cloud Congress' intent by noting that the above statement was made with regard to pretrial detention hearings under 18 U.S.C. § 3142(f)(1), not § 16. Resp. Br. at 23-24 & n.12. This argument ignores that as part of this same legislation that enacted § 16, Congress added a definition of "crime of violence" to the definition section in 18 U.S.C. § 3156(a). Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, §§ 203(a), 1001(a), 98 Stat. 1837, 1985, 2136 (1984). That definition was for use in § 3142(f)(1) and is substantially identical to the text of § 16. *See* 18 U.S.C. § 3156(a); *Lucio-Lucio*, 347 F.3d at 1205. Therefore, Congress' reference to the categories of crimes found in the DC-CRCPA's definitions of "dangerous crimes" and "crimes of violence" when discussing the definition of "crimes of violence" to be used in § 3142 applies with full force to § 16. Respondents' distinction is, therefore, meritless.[3]

B. Section 1101(h)

Further insight into Congress' intent as to whether DUI offenses involving injury are covered by § 16 comes from the 101st Congress' differentiation between § 16 and DUI offenses involving injury within 8 U.S.C. § 1101(h) (which defines "serious criminal offense"); a differentiation it made just nine months before adding "crime of violence" under § 16 to the list of "aggravated felonies" in 8 U.S.C.

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[3] Respondents also note that the legislative history states that the term "crime of violence" refers to the definitions of both "dangerous crimes" and "crimes of violence" in the DC-CRCPA. Resp. Br. at 23-24 & n.12. However, the reference to "dangerous crimes" does not change the conclusion that Congress did not intend for DUI offenses, or other crimes that may involve accidental causation of injury, to be covered by § 16. "Dangerous crimes," as defined in the DC-CRCPA, cover offenses that involve an intent or willingness to apply force or do violence. *See Lucio-Lucio*, 347 F.3d at 1205. Moreover, any suggestion that the phrase "essentially the same" indicates that Congress intended § 16 to cover accidental offenses such as DUI offenses should be rejected. This statement is most reasonably read to reflect Congress' understanding that there could be other specific offenses similar in type to those identified in the DC-CRCPA as "crimes of violence" or "dangerous crimes" that would be covered by § 16. It is not reasonably read to exhibit Congressional intent to extend the definition to cover radically different offenses (*i.e.*, accidental or unintentional acts).

§ 1101(a)(43). Pet. Br. at 34-36. Respondents assert that the 101st Congress' understanding of offenses covered by the "crime of violence" definition is not relevant to interpreting § 16 (Resp. Br. at 34-35) and pose hypotheticals implying that Congress *might* have included DUI involving injury as a separate subsection from "crimes of violence" within § 16 and yet still believed that the latter included the former (Resp. Br. at 35-36). Neither argument should be accepted.

Although respondents assert the oft-cited principle that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one" (Resp. Br. at 34-35), that principle does not apply in this case. Petitioner does not rely on the later views expressed by individual legislators towards the meaning of § 16, nor on any amendments to § 16 as evidence of original Congressional intent. Rather, turning to a subsequent statute, § 1101(h) -- which passed through the rigors of the formal legislative process and specifically incorporated § 16 -- is a useful method of statutory interpretation that illuminates the intent of the Congress that passed § 16. Viewed in this context, the language of § 1101 is not a "hazardous basis" for interpreting § 16, but rather reveals the intent of the earlier Congress and thus should be accorded "great weight." *See, e.g., Loving v. United States*, 517 U.S. 748, 770 (1996) ("subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction") (citations omitted); *Red Lion Broad. Co., Inc. v. FCC*, 395 U.S. 367, 380-81 (1969).

Recognizing that statutes should be interpreted to eliminate superfluous terms, respondents also posit an extreme hypothetical attempting to show that DUI offenses involving injury can qualify as "crimes of violence" under § 16 (and thus be covered by § 1101(h)(2)), without being redundant of § 1101(h)(3). Resp. Br. at 35-36. As respondents concede, this hypothetical depends on (i) states

not having statutory offenses criminalizing DUI resulting in injury, or (ii) situations where such a statute exists, but an offender is charged with a lesser offense. *Id.* This technical parsing of what might be possible lacks merit because there is no evidence to support it. Nothing suggests Congress added § 1101(h)(3) because some states did not have specific statutory offenses covering DUI involving injury or there was a concern that DUI incidents involving injury were not being charged as such, but rather as lesser offenses.

Respondents further hypothesize that Congress added subsection (h)(3) because Congress may have been unsure whether courts would interpret § 16 to include such DUI offenses involving injury and wanted to ensure that such offenses were considered "serious criminal offenses." Resp. Br. at 36-37. In addition to being nothing more than speculation,[4] this argument reinforces petitioner's point. Even if respondents' speculation is correct, had Congress also wanted DUI offenses involving injury to be "aggravated felonies," it could have incorporated the definition of "serious criminal offense" from § 1101(h) into § 1101(a)(43) rather than "crime of violence" under § 16 when it added § 16 to the list of "aggravated felonies" in § 1101(a)(43) just nine months after enacting § 1101(h). That, however, is not what Congress actually did.[5]

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[4] Respondents cite *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825 (1988) to support their argument that the redundancy between § 1101(h)(2) and (h)(3) under respondents' interpretation of § 16 can be excused. Resp. Br. at 36-37. *Mackey*, however, does not support respondents' position. In *Mackey*, there was evidence that Congress was aware of conflicting court opinions addressing the statute at issue. *See Mackey*, 486 U.S. at 838-39 & n.13-14. However, there is no comparable evidence in this case.

[5] Petitioner submits the rule of lenity need not be invoked in this case because the plain and ordinary meaning of the term "use of physical force against," together with its statutory context demonstrate that intentional application of force is required under § 16. However, if the

CONCLUSION

The order of the court of appeals should be vacated and the court of appeals should be directed to exercise jurisdiction over the petition for review and vacate the removal order against petitioner.

Respectfully submitted,

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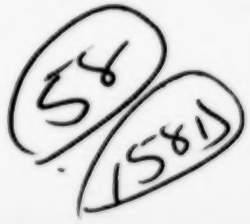
Court is still uncertain about whether Congress intended § 16 to cover unintentional offenses such as DUI involving injury, the rule of lenity should be applied. Contrary to respondents' assertion (Resp. Br. at 37 & n.17), no heightened level of ambiguity is required before the rule applies. Rather, as this Court unanimously observed, the rule of lenity applies "if after considering traditional interpretive factors, [the Court is] left genuinely uncertain as to Congress' intent." *Castillo v. United States*, 530 U.S. 120, 131 (2000).



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JOSUE LEOCAL,
Petitioner,

v.

UNITED STATES ATTORNEY GENERAL,
IMMIGRATION AND NATURALIZATION SERVICE,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICI CURIAE* CITIZENS AND IMMIGRANTS FOR EQUAL JUSTICE, AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, NATIONAL COALITION FOR HAITIAN RIGHTS, ALIANZA DOMINICANA, COALITION FOR IMMIGRANTS' RIGHTS AT THE COMMUNITY LEVEL, FAMILIES FOR FREEDOM, KOREAN IMMIGRANT WORKERS ADVOCATES, NEW YORK IMMIGRATION COALITION, AND NORTHERN MANHATTAN COALITION FOR IMMIGRANT RIGHTS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

In 1996, Congress enacted two revisions to the Immigration and Nationality Act of 1952 ("INA"), 8 U.S.C. § 1101 *et seq.*: the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 ("AEDPA"), and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, Div. C., 110 Stat. 3009 ("IIRIRA"). Under the new laws, once a conviction is classified as an "aggravated felony," 8 U.S.C. § 1101(a)(43), a host of extreme consequences follow, including mandatory detention, exclusion from eligibility for discretionary relief from removal, denial of eligibility for asylum and withholding of removal, permanent bars to naturalization, permanent bars to readmission, and enhanced criminal penalties of up to twenty years' imprisonment for reentry after deportation.

At issue in this case is the definition of "crime of violence" under 18 U.S.C. § 16, which triggers "aggravated felony" consequences for any noncitizen whose criminal sentence is at least one year—even if the sentence is suspended and the person never serves a day in jail. For the last eight years, the government has sought to impose an expansive definition of the term "crime of violence," and one of the central areas in which it has sought to impose this definition has been the treatment of convictions for driving under the influence of alcohol. At first, the Board of Immigration Appeals accepted this expansive approach, but upon further consideration, it reversed its initial interpretation of the statute. Meanwhile, the federal courts have largely

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* *Amici curiae* state that no party or its counsel has authored this brief in whole or in part, and no person or entity other than *amici*, their members, or their counsel have made any monetary contribution to its preparation. This brief is filed with the consent of all parties, and copies of the consent letters have been lodged with the Clerk of the Court.

sided against an expansive application of the term "crime of violence" and the associated consequences that result from categorizing such a crime as an "aggravated felony."

Amici curiae are community organizations whose members or constituencies face the real world consequences of classifying offenses as aggravated felonies. These members and constituents have felt the loss of loved ones due to detention, deportation, and denial of asylum. They have rejoiced with news that courts were rejecting the overly-expansive definitions pursued by the government. Many members and constituents have enjoyed a period of peace in their lives since the courts rejected the government's arguments that driving under the influence convictions should be treated as aggravated felonies. In this case, however, they face the return of the nightmare of removal proceedings with no hope to prove that they deserve to remain with their families in this country. *Amici* respectfully submit this brief to apprise the Court of the real world consequences of labeling convictions as aggravated felonies and the resulting necessity to construe any possible ambiguity in the law against labeling a crime as an aggravated felony.

Citizens and Immigrants for Equal Justice (CIEJ) is a national coalition of over 1,000 families in twenty-nine states whose integrity has been directly threatened by overly-broad interpretations of the aggravated felony classification. Our members are the family members of lawful permanent residents who face deportation. Deportation does incalculable injury to our families, separating parents from children and depriving our family members of essential income and emotional support.

The American-Arab Anti-Discrimination Committee (ADC) is a civil rights organization dedicated to defending the rights of people of Arab descent and promoting their rich cultural heritage. We have 38 active chapters nationwide that

assist the national office in grassroots work and advocacy. ADC works with an immigrant community that has been harshly affected by AEDPA and IIRIRA. Members and families in our community have suffered greatly due to mandatory detentions and deportation under these provisions. These laws have disrupted the lives of families whose members—both U.S. citizens and noncitizens—are productive individuals, have U.S. citizen children, and have strong ties to their communities. A broad definition of what constitutes a crime of violence and therefore an aggravated felony will trigger even harsher penalties for our community members.

The National Coalition for Haitian Rights (NCHR) is a national non-profit organization founded in 1982 and based in New York City. It seeks to promote and protect Haitians' rights under U.S. and international law, and to promote the rule of law and democracy in Haiti. Since its founding, NCHR has participated in litigation and campaigns on behalf of Haitians. NCHR has produced reports on human rights conditions in Haiti that are used by Haitian asylum-seekers, advocates, asylum officers and immigration judges involved in adjudicating claims. Our interest in this case stems from the fact that many beneficiaries of past campaigns have been affected by the criminalization of a civil offense that under current laws mandates deportation to a land that many hardly know or have no ties with. We believe that the law is unjust and that Haitians and other similarly situated individuals deserve to be treated fairly and justly.

Alianza Dominicana (Alianza) is a non-profit community development organization that partners with youth, families and public and private institutions to revitalize economically distressed neighborhoods. Alianza's mission is to assist children, youths, and families in breaking the cycle of poverty and fulfilling their potential as members of the global community. Since its founding 13 years ago, Alianza has emerged

as the most comprehensive Dominican human service and community development agency in the United States. Alianza annually services more than 17,000 individuals from eleven sites in Manhattan and the four other boroughs.

Coalition for Immigrants' Rights at the Community Level (CIRCLE) is dedicated to protecting the rights of immigrants and their families. We provide services to noncitizens including members of the York, Pennsylvania community as well as those in the custody of the ICE (Bureau of Immigration and Customs Enforcement, formerly known as the INS or Immigration and Naturalization Service). Since August 2000, CIRCLE has provided services to over 850 noncitizen clients, including many asylum seekers. Asylum seekers, who have fled persecution in their home country, are an especially vulnerable group and require special attention. Many have been tortured and have lost members of their immediate family. Most of our clients who are held in custody face deportation because of a past crime for which they have already paid a fine, served community service, or in some cases, served prison time.

Families for Freedom is a New York network by and for immigrants facing deportation. All of our members are current or former immigrant prisoners (detainees), their loved ones, or individuals at risk of deportation. We are multiethnic, with constituents coming primarily from Latin America, the Caribbean, and South Asia. Families for Freedom seeks to repeal the laws that are tearing apart our homes and neighborhoods, and to build the power of immigrant communities of color to provide a guiding voice in the growing movement for immigrant rights as human rights.

Korean Immigrant Workers Advocates (KIWA) has been fighting since 1992 to empower low-wage immigrant workers in their workplaces and communities in Los Angeles' Koreatown. KIWA is a community-based workers' center made up of primarily Korean and Latino immigrants. Despite their hard work and contributions to the United States and their home countries, these immigrant families face widespread exploitation. KIWA seeks to organize local workers against employer abuse as well as join in coalitions to implement policies and laws that protect immigrants' human rights.

The New York Immigration Coalition (NYIC) is an umbrella policy and advocacy organization for approximately 150 groups in New York State that work with immigrants and refugees. As the coordinating body for organizations that serve one of the largest and most diverse newcomer populations in the United States, NYIC has become a leading advocate for immigrant communities on the local, state and national levels. NYIC's membership includes grassroots community organizations, not-for-profit health and human services organizations, religious and academic institutions, labor unions, and legal and social and economic justice organizations. NYIC believes that classifying DUI convictions as aggravated felonies will cause great suffering to hardworking immigrant families and communities whose members may face removal.

The Northern Manhattan Coalition for Immigrants Rights (NMCIR) is a non-profit organization founded in 1982 to educate, defend and protect the rights of immigrants. Recognized by the Board of Immigration Appeals, NMCIR is committed to expanding access to legal immigration services, and participating in policy making and community organizing efforts. Some of the services we provide include assisting applicants with citizenship, residency, family-based petitions, detention, and deportation issues.

BACKGROUND

Following passage of IIRIRA in 1996, the government began to argue that DUI[1] offenses should be classified as "crimes of violence" under 18 U.S.C. § 16, and therefore as "aggravated felonies" under 8 U.S.C. § 1101(a)(43)(F). Relying on this argument, the government initiated deportation proceedings against large numbers of lawful permanent residents with DUI convictions and argued that there was no way in which these individuals could obtain any relief from removal. The most well-known government initiative is the infamous "Operation Last Call," in which the government rounded up hundreds of noncitizens in Texas, including long-term lawful permanent residents, with DUI convictions that often were many years old, placed them in detention, and instituted deportation proceedings against them.[2] Many of these immigrants were deported. Others fought their cases through the agency and the courts.

Operation Last Call was widely reported in the press. In October 1998, the *Wall Street Journal* discussed the impact of the government's broad reading of the crime of violence definition for DUI offenses, explaining that the government rounded up and arrested more than 530 noncitizens with DUI convictions across Texas, threatened them with deportation and, in many cases, placed them in deportation proceedings.[3] Instead of notifying individuals and ordering

[1] The terms driving under the influence ("DUI") and driving while intoxicated ("DWI") are used interchangeably in this brief.

[2] *See* Bob Ortega, *Last Call: Texas Agents Spark Outcry in Roundup Of Legal Immigrants—INS Uses Broader Definition Of Felons to Target Old DWI Convictions—Case of a Model Noncitizen*, Wall St. J., Oct. 12, 1998, at A1; David L. Marcus, *Three times and out; some face deportation for repeat drunken driving*, Boston Globe, Oct. 14, 1998, at A1.

[3] *See* Ortega, *supra* note 2, at A1.

them to report to the INS, the government humiliated entire families, arresting individuals without warning at their homes and workplaces, in some cases brandishing revolvers.[4] One of the many victims was Isaias Jauregui:

- Isaias Jauregui, a 48-year-old construction subcontractor in Texas, who immigrated to the United States from Mexico in 1976, was arrested and detained as part of Operation Last Call for a DWI conviction that was six years old. Prior to his arrest, Mr. Jauregui supported his wife, two children, and two grandchildren, all U.S. citizens, as well as provided support to his sister's family. After his last DWI conviction, he entered a rehabilitation program, joined Alcoholics Anonymous, and began working towards a college degree. His family suffered the humiliation of his public arrest and his daughter, Vicki, unable to comprehend why her father was being arrested stated, "He's made an effort. He's changed totally. That's what I don't understand about this."[5]

[4] *See* Marcus, *supra* note 2, at A1 ("On Sept. 3, agents and police brandishing revolvers showed up at Balderrama's adobe house.").

[5] *See* Ortega, *supra* note 2, at A1. Newspapers reported many other similar stories. *See* Ortega, *supra* note 2, at A1 (as part of Operation Last Call, Basilico Bustamante was rounded up, notwithstanding the fact that he was a recovering alcoholic who had two U.S.-born children, had completed a rehabilitation program, attended Alcoholics Anonymous meetings, had started going to school and had stopped drinking three years earlier); Marcus, *supra* note 2, at A1 (David Balderrama, who emigrated to the United States nearly 50 years ago, later became a lawful permanent resident, and had eight children, was caught in the net of Operation Last Call, when the INS raided his home and informed him he would be deported to Mexico); Patty Reinert, *Immigrant ex-cons fight deportation; Hope lies in high-court cases*, Houst. Chron., May 6, 2001, at 1.

At first, the Board of Immigration Appeals accepted the government's arguments for an expansive reading of the term "crime of violence." *See In re Magallanes-Garcia*, 22 I. & N. Dec. 1 (BIA 1998) (concluding that driving while intoxicated "involves a substantial risk of harm to persons and property" and as a result constitutes a crime of violence); *In re Puente-Salazar*, 22 I. & N. Dec. 1006 (BIA 1999) (same). But when the issue was considered on judicial review, the federal courts largely insisted on reading the term more narrowly. In most instances, the courts of appeals have ruled for noncitizens and have found that their DUI convictions did not constitute "crimes of violence" under 18 U.S.C. § 16. *See, e.g.*, *Dalton v. Ashcroft*, 257 F.3d 200 (2d Cir. 2001); *Francis v. Reno*, 269 F.3d 162 (3d Cir. 2001); *United States v. Chapa-Garza*, 243 F.3d 921 (5th Cir.), *amended*, 262 F.3d 479 (5th Cir. 2001); *Bazan-Reyes v. INS*, 256 F.3d 600 (7th Cir. 2001); *United States v. Trinidad-Aquino*, 259 F.3d 1140 (9th Cir. 2001). *But see Le v. U.S. Att'y Gen.*, 196 F.3d 1352 (11th Cir. 1999); *Omar v. INS*, 298 F.3d 710 (8th Cir. 2002). Subsequently, the BIA reconsidered *Puente-Salazar* and changed its position, holding that it would follow the law of the circuits that had addressed whether a DUI is a crime of violence for cases falling within their respective jurisdictions, and would follow the majority position when addressing the question in those circuits that had not yet ruled on the issue. *See In re Ramos*, 23 I. & N. Dec. 336, 345-47 (BIA 2002).

Caught in the middle of this legal debate have been long-term immigrants with strong ties to this country and compelling equities. Some face future removal proceedings. Others have suffered through detention and currently are protected from removal under court decisions that reject the government's broad reading of the crime of violence definition. Still others have already been deported. The legal back and forth regarding whether a DUI constitutes an aggravated felony has caused tremendous disruption to the lives of numerous noncitizens convicted of the offense as well as their family members.

The following examples are illustrative of the effects of the government's efforts to impose a broad reading of the aggravated felony classification on the lives of numerous noncitizens and their families:

- Felicien Cyubahiro, a 54-year-old Tutsi refugee from Rwanda, is a devout Roman Catholic who escaped the genocide of Rwanda in 1994 and later settled in Kansas City, Missouri. Tragically, Mr. Cyubahiro was haunted by the memories of the horror he had faced in Rwanda—including the killing of his wife, children, friends and neighbors—and turned to drinking. Between 1995 and 1998, he was convicted of three DWI offenses. After the last conviction, Mr. Cyubahiro entered counseling, started taking medication for the depression stemming from the tragic losses he had suffered and gave up drinking. Working hard to put his life back on track, he eventually became engaged to an American woman. However, based on the government's expansive reading of the term "crime of violence," the INS arrested Mr. Cyubahiro, detained him for about a year in an INS processing center in El Paso, Texas, far away from family and friends, and instituted deportation proceedings against him. Mr. Cyubahiro was scheduled for deportation to Rwanda, but ultimately was spared deportation due to the Fifth Circuit's ruling in *Chapa-Garza*. He has since gotten married and has recovered from his alcoholism.[6]

[6] *See* Oscar Avila, *Immigrant's missteps may deny him his dream*, Kan. City Star, Apr. 22, 2000, at A1; Telephone Interview by Saira Rao with Judy Cyubahiro, Mr. Cyubahiro's wife (Apr. 28, 2004).

- Mario Tobias had been a legal permanent resident of the United States for 25 years when he was deported to Mexico in 1999 after his 1994 DUI conviction was retroactively deemed an aggravated felony. He was forced to leave behind a wife and three children. Since Mr. Tobias' deportation, his young children have become depressed, angry, and have had difficulties at school and at home. Mr. Tobias' wife has struggled to support the family by herself, despite moving the family to a less expensive apartment. Mr. Tobias has sought to rejoin his family based on the Fifth Circuit's ruling in *Chapa-Garza*.[7]
- Andres Girosky-Garibay immigrated to the United States from Mexico and became a lawful permanent resident in 1982.[8] In 1998, he was convicted of a DWI. Mr. Girosky-Garibay married a U.S. citizen and helped raise her five children, all of whom are U.S. citizens. His mother was a lawful permanent resident and he had six brothers and sisters who were legal residents of the United States. Moreover, Mr. Girosky-Garibay successfully completed a sub-

[7] *See* Motion to Reopen and Reconsider and to Vacate Order of Removal at 1-2 (Immigration Court, Dallas, TX Apr. 17, 2001); Affidavit of Maria Tobias (Immigration Court, Dallas, TX Apr. 17, 2001); Letter and Translation of Letter from Maria Tobias (Immigration Court, Dallas, TX Apr. 17, 2001). In a letter dated May 6, 2004, *amici* alerted the Clerk of the Court that this brief would refer to several documents which are not readily available on the Internet or in electronic databases. These documents are the types of materials of which the Court may take judicial notice, but in order to avoid any inconvenience to the Court, *amici* have not sought permission to lodge these materials with the Clerk of the Court at this time. As stated in the letter, *amici* are prepared to lodge copies of these material should the Court wish to review them.

[8] *See United States v. Girosky-Garibay*, 176 F. Supp. 2d 705, 707 (W.D. Tex. 2001).

stance abuse program.[9] However, in 1998, the INS initiated removal proceedings against him based on his DWI conviction. An immigration judge found that Mr. Girosky-Garibay's DWI conviction was a crime of violence and ordered him removed from the United States.[10] The judge further ruled that, because Mr. Girosky-Garibay had been convicted of an aggravated felony, he was not eligible for cancellation of removal pursuant to 8 U.S.C. § 1229b(a). Mr. Girosky-Garibay was deported in January 2000.[11]

- Touch Rin Svay, a 23-year-old Cambodian national, born in a refugee camp on the border of Cambodia and Thailand, immigrated to the United States when he was five years old with his mother, father and younger sister Sary. After graduating high school in Portland Maine, Mr. Svay joined the U.S. Marine Corps. In 2002, Mr. Svay was convicted of driving while intoxicated and vehicular assault and manslaughter when he caused an automobile crash while home on leave that resulted in the death of his sister. Despite the seriousness of the offense, the sentencing judge stated on the record that he felt that deportation would "trouble me greatly," but felt that a sentence of less than a year would not be appropri-

[9] *Id.* at 714.

[10] *Id.* at 707.

[11] Mr. Girosky-Garibay later illegally reentered the United States and the government prosecuted him, seeking a penalty enhancement based on his DWI conviction. In removal proceedings filed pursuant to this reentry, Mr. Girosky-Garibay challenged the legality of his original order of removal based on the Fifth Circuit's ruling in *Chapa-Garza*. The district court found in Mr. Girosky-Garibay's favor. *Id.* at 708. In so doing, the court specifically noted that, based on his family ties, Mr. Girosky-Garibay was reasonably likely to have been granted cancellation of removal had his DWI not initially been deemed to bar him from such relief. *Id.* at 714.

ate. Because the United States has recently signed a repatriation agreement with Cambodia, Mr. Svay will face deportation proceedings following his prison term. If his crime is deemed an "aggravated felony," no judge will be able to consider the pleas of his parents, both refugees from Cambodian genocide, who have lost their daughter and now face the loss of their son. No judge will be able to consider the fact of Mr. Svay's service in the armed forces, the circumstances of the crime, or what it would mean to Mr. Svay to be deported to a country in which he has never lived and from which his family escaped.[12]

Even for those individuals who have ultimately been able to return to the United States after having been deported, their families have suffered immensely from the disruption caused by their loved one's deportation.

- Hugh Morgan emigrated from Ireland to the United States as a young child and became a lawful permanent resident at the age of six in 1969. In March 1999, he was convicted of driving while intoxicated. Mr. Morgan was deported to Ireland shortly prior to the Second Circuit's ruling that driving under the influence is not a crime of violence. For a year, he lived in Ireland where he was treated as a foreigner and ostracized. During that period, he was also separated from his son Sean, who was his pride

[12] *See* Josie Huang, *Cambodians fear worst for deportees; Community leaders believe stigma and culture shock await individuals forced to leave their only home since childhood*, Portland Press Herald, May 25, 2002 at 1A; Seth Mydans, *Dead End for Cambodians Who Grew So American*, N.Y. Times, Aug. 9, 2002, at A3; *State v. Touch Rin Svay*, No. SRP-02-279 (Me. July 21, 2003), *available at* http://www.courts.state.me.us/opinions/2003%20documents/03me93sv.htm.

and joy. Sean, a U.S.-born citizen, suffered horribly from the separation from his father—he began to have problems at school where his grades slipped dramatically and he got into fights with his peers, his relationship with his mother deteriorated, and he turned into a sullen, withdrawn and moody child. When Mr. Morgan's removal order was vacated by the BIA, he was able to return to the United States and his family. After being reunited with his father, Sean was once again a youthful exuberant child, his grades greatly improved and his problems with his peers at school vanished.[13]

Some of the noncitizens facing deportation proceedings subsequent to DUI convictions, while having been detained for years, ultimately were permitted to remain in the United States as a result of court of appeals decisions such as *Chapa-Garza*. Many of these individuals have been living productive lives and have deepened their ties to the United States in the past few years. If the Court now rules that DUI offenses are crimes of violence and therefore aggravated felonies, these noncitizens will again face the prospect of deportation to countries they may not remember and where they may not speak the language, as well as painful separations from their family members and communities.

[13] *See* Declaration of Hugh R. Morgan, *Morgan v. INS* (2d Cir. Apr. 27, 2002) (No. 00-4188); Declaration of Christine Palacio, *Morgan v. INS* (2d Cir. Apr. 25, 2002) (No. 00-4188); Stipulation and Order of Dismissal, *Morgan v. INS* (2d Cir. May 22, 2002) (No. 00-4188). *Amici* are prepared to lodge copies of these material should the Court wish to review them. *See supra* note 7.

SUMMARY OF ARGUMENT

Amici know first-hand that defining a criminal offense as an "aggravated felony" imposes extremely harsh consequences on noncitizens under the federal immigration and criminal laws by rendering noncitizens (1) ineligible for numerous forms of relief from removal, (2) ineligible for asylum, (3) ineligible for naturalization, (4) subject to mandatory detention, and (5) ineligible to ever reenter the United States and subject to harsh criminal penalties for doing so. (*Point I.*) In light of these tremendously severe consequences—which arguably make the "aggravated felony" category the most severe classification ever to exist under the immigration laws—*amici* respectfully submit that should the Court find any ambiguity in the language of 18 U.S.C. § 16, the Court should apply the longstanding-principle of lenity in the interpretation of immigration statutes to hold that a DUI offense does not constitute an "aggravated felony." (*Point II.*)

ARGUMENT

I. DEFINING A CRIMINAL OFFENSE AS A "CRIME OF VIOLENCE," AND THEREFORE AN "AGGRAVATED FELONY," IMPOSES EXTREMELY HARSH CONSEQUENCES ON LAWFUL PERMANENT RESIDENTS WHO ARE PRODUCTIVE, ROOTED MEMBERS OF AMERICAN SOCIETY, AND ON OTHER NONCITIZENS WITH COMPELLING REASONS FOR MAINTAINING U.S. RESIDENCY

The classification of a criminal offense as an "aggravated felony" triggers many of the harshest consequences possible under the federal immigration laws for noncitizens convicted of such offenses, perhaps rendering it the most severe immigration classification ever enacted. These consequences include (1) absolute bars on an immigration judge's ability to exercise discretionary authority to permit a noncitizen to remain in the country (*i.e.*, to consider equitable factors such as length of U.S. residence, gainful employment, hardship to family members in the United States, and completion of rehabilitation programs); (2) ineligibility for asylum; (3) permanent bars to citizenship, even for convictions that pre-date changes in the law; (4) mandatory detention; and (5) imprisonment of up to twenty years for reentry into the United States subsequent to deportation.

A. Noncitizens Convicted Of An Aggravated Felony Are Ineligible For Discretionary Relief From Removal

In recognition of the far-reaching consequences of immigration decisions, the immigration laws have long included several provisions that empower judges to grant discretionary relief from removal to otherwise deportable or inadmissible noncitizens, based on their individual circumstances and equities. *See, e.g.*, 8 U.S.C. §§ 1229b, 1229c (authorizing various forms of discretionary relief). However, noncitizens convicted of an aggravated felony are categorically ineligible for the vast majority of these forms of discretionary relief.

1. Cancellation Of Removal

The immigration laws permit an immigration judge to cancel the removal of a noncitizen who is deportable or inadmissible when certain circumstances are met. Lawful permanent residents are eligible for cancellation of removal if they (1) have been lawfully admitted as permanent residents for at least five years and (2) have spent seven continuous years as U.S. residents in "any status." 8 U.S.C. § 1229b(a). Winning cancellation of removal depends heavily on the noncitizen's ability to present sufficient positive equities, including family ties, length of

time in the United States, hardship should deportation occur, service in this country's armed forces, employment history, property or business ties, evidence of value and service to the community, proof of genuine rehabilitation, and other evidence of good character, such as affidavits from family, friends, and community representatives. *In re C-V-T-*, 22 I. & N. Dec. 7, 11 (BIA 1998).

Cancellation of removal also is available for nonpermanent residents who can show (1) ten years of continuous physical presence in the United States, (2) extreme and unusual hardship to a U.S. citizen or lawful permanent resident spouse, parent or child if the nonpermanent resident is removed, and (3) good moral character. 8 U.S.C. § 1229b(b). However, both lawful permanent residents and nonpermanent resident noncitizens are statutorily barred from obtaining cancellation of removal, without regard to their individual circumstances, if they have been convicted of an aggravated felony.[14] 8 U.S.C. § 1229b(a)(3) & (b)(1)(C). Such was the case for Mr. Girosky-Garibay, *see supra* pp. 10-11 & n.11, who was found ineligible to apply for cancellation of removal notwithstanding his strong family ties in the United States.

Thus, if a noncitizen's DUI-related offense is deemed to be an aggravated felony, an immigration judge is statutorily barred from considering equitable factors that otherwise could and would be considered, including:

[14] Similarly, a lawful permanent resident who has been convicted of an aggravated felony is statutorily barred from seeking a family hardship waiver under 8 U.S.C. § 1182(h), which permits discretionary relief from inadmissibility if denial of admission would result in extreme hardship to a spouse, parent, son, or daughter who is a U.S. citizen or lawful permanent resident. *See Yeung v. INS*, 76 F.3d 337, 340 (11th Cir. 1996). Applications for relief under § 1182(h) are adjudicated with reference to the same discretionary factors that are considered for cancellation of removal. *See In re Mendez-Moralez*, 21 I. & N. Dec. 296, 299-302 (BIA 1996).

- the dramatic psychological and financial impact that the deportation of a parent has on a child and other family members—as in the case of Mario Tobias, Isaias Jauregui, and Hugh Morgan;
- the fact that a noncitizen has entered a rehabilitation program, stopped drinking and in many cases has completely rehabilitated—as in the case of Isaias Jauregui, Basilio Bustmamente, and Felicien Cyubahiro;
- the length of a noncitizen's residency in the United States and the lack of any meaningful ties to the noncitizen's home country—as in the case of David Balderrama (nearly fifty years residency), Hugh Morgan, (over thirty years residency), Mario Tobias (twenty-five years residency), and Touch Rin Svay (over fifteen years residency in the United States and at no time lived in Cambodia to where he would be deported);
- service in the U.S. Armed Forces, as in the case of Touch Rin Svay; and
- the hardship of deporting a person to a country from which the immigrant or the immigrant's family escaped genocide, as in the case of Felicien Cyubahiro from Rwanda and Touch Rin Svay from Cambodia.

2. Voluntary Departure

Under the INA, the government may grant a noncitizen the discretionary relief of voluntarily departing the United States at the noncitizen's expense, in lieu of being subject to an order of removal. *See* 8 U.S.C. § 1229c(a)(1). This form of relief is valuable not only because it enables noncitizens to avoid the stigma and harassment of removal

proceedings and to depart to a country other than their native one (*e.g.*, to avoid persecution), but also because it allows noncitizens to escape certain statutory bars that preclude admission for several years following removal—thus preserving their ability to return legally to the United States in the future. However, immigration judges are statutorily precluded from considering granting voluntary departure relief to a noncitizen who has been convicted of an aggravated felony. *See* 8 U.S.C. § 1229c(b)(1)(C).

3. Expedited Removal

Certain individuals convicted of an aggravated felony may also be placed in expedited removal proceedings under 8 U.S.C. § 1228, in which they never even see an immigration judge. If a noncitizen is placed in such a proceeding, that individual may become ineligible for *all* forms of discretionary relief. *See* 8 U.S.C. § 1228(b)(5) (barring eligibility for any form of discretionary relief for individuals in expedited removal proceedings). Therefore, a noncitizen convicted of a DUI that is classified as a "crime of violence," and thus an "aggravated felony," would be deprived of significant discretionary protections which that individual otherwise would be afforded if his DUI offense were not deemed a "crime of violence."

B. Refugees Convicted Of An Aggravated Felony Are Ineligible For Asylum And Withholding Of Removal

Individuals who have suffered past persecution or who face a well-founded fear of future persecution in their home countries are eligible for various forms of relief in the United States, including asylum. But such persons who also are convicted of a "particularly serious crime" are statutorily barred from eligibility for many of these forms of relief and may in fact have such forms of relief revoked based on their convictions.

First, individuals convicted of an offense deemed to be a "particularly serious crime" are categorically precluded from obtaining asylum in the United States. 8 U.S.C. §1158(b)(2)(A)(ii). An individual convicted of an "aggravated felony" is automatically deemed to have been convicted of a "particularly serious crime," and therefore is statutorily barred from obtaining asylum. 8 U.S.C. §1158(b)(2)(B)(i). Thus, if DUI offenses were treated as "aggravated felonies," then asylum officers and immigration judges would lack any discretion whatsoever to grant asylum status to refugees convicted of this crime, no matter how compelling the refugee's situation or how great the danger of persecution the refugee would face if returned to his or her home country.[15]

Moreover, even a refugee who already has been granted asylum in the United States is subject to termination of his or her asylum status, and to removal, if convicted of a "particularly serious crime" including, for the reasons described above, a DUI deemed an aggravated felony. 8 U.S.C. § 1158(b)(2)(B)(i), (c)(2)(B) & (c)(3).

Finally, depending on the length of the sentence he or she receives, a refugee or asylee who is convicted of an aggravated felony could be barred from obtaining withholding of removal relief under 8 U.S.C. § 1231(b)(3) based on his or her previously-established fear of persecution in the country to which he or she would be removed. *See*

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[15] By contrast, if DUI offenses are not categorically defined to constitute an aggravated felony, then an immigration judge evaluating the case of an individual convicted of a particularly heinous DUI may still deem that individual's offense to be a "particularly serious crime" and deny asylum—so failure to classify all DUI offenses as aggravated felonies does not automatically result in all DUI offenders being eligible for asylum.

8 U.S.C. § 1231(b)(3)(B)(ii).[16] This result is possible because withholding of removal relief is unavailable to individuals convicted of a "particularly serious crime" which, for withholding of removal purposes, automatically includes a conviction of an aggravated felony with an aggregate sentence of at least five years. 8 U.S.C. §1231(b)(3)(B)(ii).

Thus, refugees such as Felicien Cyubahiro, *see supra* p.9, who have fled persecution in their home country, including the killing of family members, and who have a well-founded fear of persecution if returned to their home country, could (1) be barred from obtaining asylum; (2) have any asylum grant terminated; and (3) be ineligible for withholding of removal.

C. Noncitizens Convicted Of An Aggravated Felony Are Ineligible For Naturalization

In order to naturalize and become a U.S. citizen, a noncitizen ordinarily must establish, among other things, that he or she has been a person of "good moral character" during certain specified periods of time before applying to naturalize and has continued to be of good moral character while the naturalization application is pending. *E.g.*, 8 U.S.C. § 1427(a)(3). However, a noncitizen convicted of an aggravated felony after November 29, 1990 may be permanently barred from naturalization, since the 1990 amendments to the INA preclude an individual "who at *any time* has been convicted of an aggravated felony" from establishing good moral character. 8 U.S.C. § 1101(f)(8)

[16] The INA provides generally that "[n]otwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A).

(emphasis added); Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, § 509(b) (bar to establishing good moral character applies to aggravated felony convictions "occurring on or after" date of enactment). Because the 1996 expansions of the aggravated felony definition are applied retroactively, convictions that fall within the amended aggravated felony definition serve to bar citizenship for many lawful permanent residents who pled guilty to their offenses before the law changed in 1996—including individuals who may have been granted discretionary relief from removal prior to the enactment of AEDPA and IIRIRA.

D. Noncitizens Convicted Of An Aggravated Felony Are Subject To Mandatory Detention While Removal Proceedings Are Pending

Under 8 U.S.C. § 1226(c), any noncitizen convicted of an aggravated felony is subject to mandatory detention while removal proceedings are pending, without any individualized determination that such detention protects against danger and flight risk. *See generally Demore v. Kim*, 538 U.S. 510 (2003). In contrast, when the conviction does not trigger mandatory dentition, the noncitizen can present evidence that he or she is not a danger or a flight risk. Mandatory detention disrupts every aspect of a person's life, tearing individuals away from their families, preventing them from working, running businesses, and attending school, and subjecting them to onerous prison conditions. Although immigration proceedings are civil, those noncitizens who have been subject to mandatory detention, such as Felicien Cyubahiro and Isaias Jauregui, have suffered a total loss of liberty.

E. Noncitizens Convicted Of An Aggravated Felony Face Enhanced Barriers To Reentry And Draconian Penalties For Reentry Or Attempted Reentry To The United States

Generally, noncitizens convicted of aggravated felonies are forever precluded from reentering the United States following their removal. *See* 8 U.S.C. § 1182(a)(9)(A)(i) (providing that "[a]ny alien who has been ordered removed under section 1225(b)(1) of this title or at the end of proceedings under section 1229a of this title initiated upon the alien's arrival in the United States and who again seeks admission . . . at any time in the case of an alien convicted of an aggravated felony" is inadmissible). This general rule is subject to an exceedingly narrow exception, under which the Attorney General may grant advance consent to apply for readmission. *See* 8 U.S.C. § 1182(a)(9)(A)(iii) ("Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Attorney General has consented to the alien's reapplying for admission."). Thus, once an offense is classified as an aggravated felony it serves as a bar to reentering the United States, regardless of the individual's personal and familial ties to the United States.

Moreover, a noncitizen who enters or attempts to reenter the United States after being removed subsequent to an aggravated felony conviction, regardless of the reasons for the individual's reentry, faces draconian criminal penalties, which are much more severe than those imposed on other individuals who have been deported but who reenter or attempt to reenter the United States. In particular, a noncitizen whose conviction for criminal reentry "was subsequent to a conviction for commission of an aggravated felony" are subject to a prison sentence of up to twenty years. 8 U.S.C. § 1326(b)(2).

Hence, if the Court decides that a DUI offense is a crime of violence, defendants like Andres Girosky-Garibay[17] or defendants similarly situated to those in *United States v. Vargas-Duran*, 356 F.3d 598 (5th Cir. 2004), *cert. denied*, 124 S. Ct. 1728 (2004); *United States v. Trinidad-Aquino*, 259 F.3d 1140 (9th Cir. 2001); *United States v. Trinidad Lucio-Lucio*, 347 F.3d 1202 (10th Cir. 2003), will face enhanced sentences of up to twenty years.

II. ANY AMBIGUITIES IN 18 U.S.C. § 16 SHOULD BE CONSTRUED NARROWLY IN FAVOR OF THE NONCITIZEN

Amici first and foremost advance that there is no ambiguity in the plain language of 18 U.S.C. § 16 and that the Florida DUI statute at issue in this case does not meet the definition of a crime of violence. *See, e.g*, *Dalton v. Ashcroft*, 257 F.3d 200, 207-08 (2d Cir. 2001); *Bazan-Reyes v. INS*, 256 F.3d 600, 609-11 (7th Cir. 2001); *United States v. Chapa-Garza*, 243 F.3d 921, 927 (5th Cir. 2001). However, should the Court conclude that 18 U.S.C. § 16 is ambiguous in any way, all such ambiguities should be construed in favor of the noncitizen, given the tremendously harsh consequences faced by individuals with aggravated felony convictions. Such an interpretation is warranted in light of the "longstanding principle" that this Court has recognized of "'construing any lingering ambiguities in deportation statutes in favor of the alien.'" *INS v. St. Cyr*,

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[17] The government could have requested a penalty enhancement based on an aggravated felony conviction stemming from Mr. Girosky-Garibay's DWI conviction, but instead based the penalty enhancement request on a felony offense of DWI. *United States v. Girosky-Garibay*, 176 F. Supp. 2d 705, 708 n.5 (W.D. Tex. 2001).

533 U.S. 289, 320 (2001) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987)).

This principle of lenity in the interpretation of deportation statutes recognizes the harsh consequences that result from deportation. *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) (resolving statutory ambiguities in favor of noncitizen "because deportation is a drastic measure and at times the equivalent of banishment or exile"); *see also Barber v. Gonzales*, 347 U.S. 637, 642 (1954) ("[D]eportation statutes as a practical matter may inflict 'the equivalent of banishment or exile'"). As the Court repeatedly has recognized, the "stakes are indeed high and momentous for the alien who has acquired his residence here." *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947). Indeed, those "stakes" are particularly "weighty" where, as here, the noncitizen is a long-time legal permanent resident who stands to "lose the right to . . . [live with his] immediate family, a right that ranks high among the interests of the individual." *Landon v. Plasencia*, 459 U.S. 21, 34 (1982); *see also Bridges v. Wixon*, 326 U.S. 135, 147 (1945) ("[D]eportation may result in the loss 'of all that makes life worth living.'" (quoting *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922)).

In the criminal context, this Court long has embraced a similar rule, noting that "[w]hen Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity." *Bell v. United States*, 349 U.S. 81, 83 (1955); *see also Cleveland v. United States*, 531 U.S. 12, 25 (2000) ("[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity."); *United States v. Wiltberger*, 18 U.S. 76, 95 (1820) ("The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself."). Indeed, to the extent that individuals with aggravated felony convictions potentially face serious criminal and sentencing consequences outside the deportation context, such as the enhanced penalties for illegal reentry discussed above, the criminal rule of lenity offers further support for a strict construction of 18 U.S.C. § 16 . *Cf. United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 518 & n.10 (1992) (in civil action, criminal rule of lenity applies when construing ambiguous statute that "has criminal applications").

A limiting construction of the aggravated felony definition that favors the noncitizen is justified "not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or anti-social conduct." *Bell*, 349 U.S. at 83. Rather, lenity in the interpretation of deportation statutes "promote[s] fair notice," "minimize[s] the risk of selective or arbitrary enforcement," and "maintain[s] the proper balance between Congress, prosecutors, and courts." *United States v. Kozminski*, 487 U.S. 931, 952 (1988). As the Second Circuit emphasized in holding that a DUI conviction under New York law does not satisfy the requirements of 18 U.S.C. § 16:

> [N]othing in our decision today in any way underestimates the toll that drunk driving has taken on human life . . . . But by shoehorning such reprehensible conduct into criminal statutes that were not designed to hold it, we risk an equivalent harm of usurping federal and state legislative roles.

Dalton v. Ashcroft, 257 F.3d 200, 208 (2d Cir. 2001) (citing *Fong Haw Tan*, 333 U.S. at 10); *see also Bonetti v. Rogers*, 356 U.S. 691, 699 (1958) (citing *Bell* to quash an order of deportation based on petitioner's prior membership in the Communist party); *Fong Haw Tan*, 333 U.S. at 10 ("[W]e will not assume that Congress meant to trench on [an immigrant's] freedom beyond that which is required by the narrowest of several possible meanings of the words used.").

Long before Congress created the "aggravated felony" category and designated the array of immigration consequences discussed above, this Court interpreted similar statutory provisions in the immigration laws narrowly when their application would visit punitive immigration consequences upon noncitizens. For example, in *Fong Haw Tan v. Phelan*, 333 U.S. 6 (1948), the petitioner had been sentenced to life imprisonment for having murdered two persons. Section 19(a) of the Immigration Act of February 5, 1917, 8 U.S.C. § 155(a), provided in relevant part that "an alien 'who is sentenced more than once' to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude . . . shall be deported." *Fong Haw Tan*, 333 U.S. at 7 (quoting 8 U.S.C. § 155(a)). The petitioner was declared deportable during his imprisonment and, once paroled, was taken into custody by the INS pending deportation. *Id.* at 8. Facing the question whether the sentence of life imprisonment for two counts of murder meant that the petitioner had been "sentenced more than once" within the meaning of the statute, the Court unanimously reversed the order of deportation. The Court concluded that "because deportation is a drastic measure and at times the equivalent of banishment or exile," doubts concerning an immigration statute's interpretation should be resolved in favor of the construction that favors the noncitizen as the "narrowest of several possible meanings of the words used." *Id.* at 10, 28; *accord INS v. Errico*, 385 U.S. 214, 225 (1966).

Since *Fong Haw Tan*, other decisions by this Court have reaffirmed and elaborated upon the basis for narrowly interpreting statutes that carry harsh immigration consequences. For example, in *INS v. St. Cyr*, 533 U.S. 289 (2001), the Court held that a noncitizen could not be precluded retroactively under provisions of AEDPA and IIRIRA from applying for discretionary relief from deportation "because noncitizens

cannot vote" and are therefore "particularly vulnerable to adverse legislation." *Id.* at 315 n.39. In *INS v. Errico*, the Court recognized that the rule of lenity may have special utility where it results in an interpretation of an underlying statute that is consistent with that statute's "humanitarian purpose." 385 U.S. at 225 (interpreting INA provision saving from deportation under certain conditions noncitizens who obtained entry through misrepresentation). Even where the statute being interpreted was intended to penalize noncitizens for engaging in reprehensible conduct, the Court has held that the rule of lenity applies to prevent categorical interpretations of a statute from resulting in the disproportionately harsh punishment of noncitizens who technically would be covered by the statute if the narrowing construction were not used. *See Costello v. INS*, 376 U.S. 120, 130-31 (1964) (INA § 241(a)(4) does not support deportation of immigrants naturalized at the time of their convictions who later become denaturalized, in part because such persons would include those whose original naturalization was legally invalid on technical grounds rather than due to their own misrepresentation).

In light of the litany of especially harsh consequences described and illustrated above that result from an "aggravated felony" conviction, the Court should construe any possible ambiguity in the definition of a crime of violence against treating DUI offenses as aggravated felonies. Application of the rule of lenity helps assure that Congress carefully determines the conduct constituting aggravated felonies in light of the devastating consequences that conviction for such offenses imposes on noncitizens and their families.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that the judgment of the court of appeals should be reversed.

Respectfully submitted,

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No. 03-583

In the Supreme Court of the United States

Josue Leocal,

Petitioner

v.

John D. Ashcroft, in his capacity as United States Attorney General, and the Immigration and Naturalization Service,

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF THE MIDWEST IMMIGRANT & HUMAN RIGHTS CENTER AS AMICUS CURIAE IN IN SUPPORT OF PETITIONER

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Brief of the Midwest Immigrant & Human Rights Center as Amicus Curiae in Support of Petitioner

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With the consent of the parties, *amicus curiae* **Midwest Immigrant & Human Rights Center** ("MIHRC") respectfully submits this brief in support of the Petitioner, Josue Leocal.*

B. INTEREST OF *AMICUS CURIAE*

The Midwest Immigrant and Human Rights Center (MIHRC), a program of Heartland Alliance for Human Needs and Human Rights, provides direct legal services to and advocates for impoverished immigrants, refugees, and asylum seekers. MIHRC, formerly known as Travelers and Immigrants Aid, has worked with and represented low-income immigrants since 1881, including immigrants like Mr. Leocal, who are in deportation proceedings by the United States Bureau of Immigration and Customs Enforcement (formerly the Immigration and Naturalization Service) due to past criminal conduct. MIHRC conducts legal rights presentations and individual legal consultations in various county jails throughout Illinois, Indiana, and Wisconsin, and litigates on behalf of immigrants in immigration courts and the federal courts, often in conjunction with local lawyers working *pro bono publico*. Through direct legal services and advocacy, MIHRC strives to advance local and

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* Counsel of record for the parties do not object to the filing of this brief. In accordance with this Court's Rule 37.2(a), those letters have been filed with the Clerk.

In accordance with Rule 37.6, *amicus* states that this brief was authored in its entirety by the counsel listed on the cover, and no person or entity other than the *amicus* listed on the cover made a monetary contribution to the preparation or submission of this brief.

international human rights and protections for immigrants, refugees and asylum seekers, including the right to be free from arbitrary or unreasonable detention.

C. SUMMARY OF THE ARGUMENT

Question(s) presented: Whether, in the absence of a mens rea of at least recklessness with respect to the active application of force against another, DUI with serious bodily injury is a "crime of violence" under 18 U.S.C. § 16 that constitutes an "aggravated felony" under § 101 of the INA ?

In essence, driving under the influence ("DUI") is not a deportable offense because it is not a crime of violence. The legislation and the legislative history, from the enactment of section 16 in 1984 to the present, manifest a clear and unequivocal Congressional intent to not have DUI be classified as a section 16 crime of violence. In passing section 16, Congress modeled the crimes of violence after the DC Court Reform Act, which categorized crimes of violence to include crimes such as murder, mayhem, forcible rape, but did not include DUI. In the litany of amendments to the immigration laws, Congress never saw fit to include DUI into any part of the statute, except one. The only portion of the immigration law to reference DUI is 8 U.S.C. §1101(h), which shows that Congress considers DUI as a serious criminal offence, but not a crime of violence. Even later amendments never included DUI as a crime of violence. But-for section 1101(h), the immigration laws are silent on this point. Against, this inchoate backdrop, Congress never understood that DUI would be a crime of violence under section 16 and hence a deportable offense.

Statutes At Issue

Section 16	18 U.S.C. §16

Section 1101	8 U.S.C. §1101
Section (h)	8 U.S.C. §1101(h)
Section 43(F)	8 U.S.C. §1101(a)(43)(F)

D. ARGUMENT

The analytical construct for determining whether driving under the influence ("DUI") is a deportable offense is as follows. If DUI is a crime of violence under 18 U.S.C. §16, then it is a crime of violence and an aggravated felony under 8 U.S.C. § 1101(a)(43)(F). If it is a crime of violence under (43)(F), then it becomes an aggravated felony and a deportable offense under 8 U.S.C. §1227(a)(2)(A)(iii). The question, therefore, is whether DUI qualifies as a crime of violence under 18 U.S.C. §16, for if it does not, then the entire analytical construct collapses. Fortunately for Mr. Leocal, whether DUI qualifies as a section 16 crime is a question of law and thus this Court need not defer to the lower courts' determinations. To the extent there is some dispute over the construction of this section, any doubt must be resolved in favor of Mr. Leocal, as deportation is a drastic measure. *I.N.S. v. Errico*, 385 U.S. 214, 225 (1966).

This Court cannot narrowly view the issue as being whether section 16, divorced from the context of immigration law, includes DUI as a crime of violence. The certified Question includes the context of immigration law removability, and hence requires an examination of section 16 in conjunction with the immigration removal laws. For this reason, *Amicus* also analyzes the relevant immigration laws to demonstrate that Congress did not intend that DUI be classified as an aggravated felony and hence a deportable offense.

(i) Congress specifically enumerated various felonies but did not intend to include DUI as a crime of violence

The plain language of the statute is the starting point for statutory analysis. *Watt v. State of Alaska*, 451 U.S. 259, 265 (1981). The Court may also look to "the statute's language, structure, subject matter, context, and history – factors that typically help courts determine a statute's objectives and thereby illuminate its text." *Almendarez-Torres v. United States*, 523 U.S. 224, 228 (1998). The "title of a statute and the heading of a section are 'tools available for the resolution of doubt' about the meaning of a statute." *Almendarez-Torres*, 523 U.S. at 234. Nowhere in any relevant section is an aggravated felony defined to include DUI. The inclusion of DUI is a judicial creation. That is, when Congress chose to define "aggravated felony" in section 43(F), it did not include DUI and Congress' treatment of DUI in relation to the immigration laws shows that it did not intend that DUI be a crime of violence or an aggravated felony.

Congress coined the term, "crime of violence" in 1970, when it denominated a category of crimes for which detention without bail was authorized. Dist. of Columbia Court Reform and Procedural Act of 1970, Pub. L. No. 91-358, 84 Stat. 473 (1970)("DC Court Reform Act"). It listed various crimes but certainly did not include DUI as a listed offense.

To that end, the text of the DC Court Reform Act created two categories of crimes, in section 201, which could justify preventive detention. The first, "dangerous crime", was defined as:

> (A) taking or attempting to take property from another by force or threat of force, (B) unlawfully entering or attempting to enter any premises adapted for overnight accommodation of persons or for carrying on business with the intent

> to commit an offense therein, (C) arson or attempted arson of any premises adaptable for overnight accommodation of persons or for carrying on business, (D) forcible rape, or assault with intent to commit forcible rape, or (E) unlawful sale or distribution of a narcotic or depressant or stimulant drug . . . if the offense is punishable by imprisonment for more than one year.

"Crime of violence" was a sister category, the second of the two types of crime that would potentially justify preventive detention. It was defined as follows:

> [T]he term "crime of violence" means murder, forcible rape, carnal knowledge of a female under the age sixteen, taking or attempting to take immoral, improper, or indecent liberties with a child under the age of sixteen years, mayhem, kidnapping, robbery, burglary, voluntary manslaughter, extortion or blackmail accompanied by threats of violence, arson, assault with intent to commit any offense, or an attempt or conspiracy to commit any of the foregoing offenses . . . if the offense is punishable by imprisonment for more than one year.

Perhaps this is why that, in defense of the DC Act, the Nixon administration testified that concluding that DUI was dangerous to the community at large would be simply unreasonable:

> [A] court could say that . . . a petty offense was dangerous to the community, the guy was a drunk driver for example, and this was dangerous to the community. Such a conclusion, however, would be simply unreasonable . . . . Testimony of Donald Santarelli, Ass. Dep. Atty. Gen., "Preventative Detention: Hearings Before the

Subcomm. on Constitutional Rights," Senate Comm. on the Judiciary, 91st Cong. 314 (1970).

Similar arguments were made regarding the DC Act by other members of the Nixon administration. The Attorney General, for example, published a law review article stating that detention without bail under the proposed Act would only be imposed for offenses that were punishable by death at the time of the American Revolution. J. Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 Va. L.R. 1223 (1969).

Other testimony before the Subcommittee on Constitutional Rights referenced the Attorney General's article. Finally, as Crawford and Hutchins note, studies tracking serious crime in the District of Columbia, studies which the Administration relied on to justify preventive detention, did not examine occurrences of DUI. Crawford & Hutchins, *Ignoring Congress: The Board Of Immigration Appeals and Crimes of Violence in Puente and Magallanes*, 6 Bender's Immig. Bull. 67 (2001).

Congress first passed 18 U.S.C. §16 in 1984 as part of the Comprehensive Crime and Control Act of 1984 and *has never amended* it in any regard, much less amend it to define a crime of violence to include DUI. Whilst Congress has never muddled with section 16, it has, as we shall soon see, muddled extensively with the immigration laws to expressly enumerate various deportable crimes and in one instance define a particular crime to include DUI.

The legislative history of section 16 shows that Congress modeled it after the D.C. Court Reform Act. The Senate Report indicates that Congress meant that a crime of violence under §16 to include the same type of offenses as in the DC Court Reform Act's definition of a crime of violence. As noted above, "crimes of violence"

under the Act means murder, forcible rape, carnal knowledge of a female under the age of sixteen, taking or attempting to take immoral, improper, or indecent liberties with a child under the age of sixteen years, mayhem, kidnapping, robbery, burglary, voluntary manslaughter, extortion or blackmail accompanied by threats of violence, arson, assault with intent to commit any offense, assault with a dangerous weapon, or an attempt or conspiracy to commit any of the foregoing offenses. 1984 U.S.C.C.A.N. 3182, 3203-04 ("These offenses are essentially the same categories of offenses described in the District of Columbia Code by the terms "dangerous crime" and "crime of violence" for which a detention hearing may be held under that statute."); *see also*, Crawford & Hutchins, *Ignoring Congress: The Board Of Immigration Appeals and Crimes of Violence in Puente and Magallanes*, 6 Bender's Immig. Bull. 67 (2001); M. Salemi, Comment, *DUI as a Crime of Violence Under 18 U.S.C. § 16(b): Does a Drunk Driver Risk Using Force?* 33 Loy. U. Chi. L. J. 691 (Spring 2002). As such, the phrase "crime of violence" was intended to include the same types of offenses as the DC Court Reform Act's definitions of crimes of violence.

Common sense shows how DUI is not even in the same realm of heinousness as the above crimes. For example, it would strain credulity to import DUI into the DC code so that it reads like, "murder, forcible rape, carnal knowledge of a female under the age of sixteen, taking or attempting to take immoral, improper, or indecent liberties with a child under the age of sixteen years, mayhem, kidnapping, robbery, burglary, voluntary manslaughter, *DUI*, ..." At a glance, DUI's placement in the list is at best, odd. Common sense militates otherwise. *BedRoc Ltd., LLC v. U.S.*, 124 S.Ct. 1587, 1596 (2004)(Thomas and Breyer, JJ, concurring in judgment)("As the plurality points out, both common sense and the 'statutory context' of the Pittman Act's enactment confirm the view that sand and gravel are not

included within the Pittman Act's mineral reservations, since sand and gravel were not understood to be 'valuable minerals' at the time of the passage of the Act.").

Congress then passed the 1988 Anti-Drug Abuse Act (ADAA), 102 Stat. 4181 (now 8 U.S.C. § 1101(a)(43)), which included the term "aggravated felony" in relation to the Immigration Act. The ADAA definition of an aggravated felony only included the most serious crimes such as murder and drug trafficking. It did not list DUI offenses in that definition. Where Congress, in promulgating the statute, chose to specifically enumerate certain felonies and omitted others, Congress did not intend that the omitted felonies be passively included within the statute's construction.

(ii) If DUI is already a crime of violence under §1101(h)(2), then it renders the express definition of DUI under §1101(h)(3) superfluous.

Perhaps the death knell to the Government's position that DUI is an offense under section 16 or section 43(F) is that Congress chose to define a "serious criminal offense" in section 1101(h) to include DUI. In 1990, it passed Pub. L. No. 101-246, which specifically defined that a "serious criminal offense" includes "any crime of reckless driving or of driving while intoxicated or under the influence of alcohol or of prohibited substances if such crime involves personal injury to another." §1101(h)(3).[1]

[1] When Congress enacted section 1101(h), it simultaneously added paragraph (34) to section 1182(a) of the Immigration and Nationality Act, which defines classes of aliens who are ineligible for visas and or *admission* into the United States. Pub. L. No. 101-246. Under section 1182(a)(34), diplomats who have left the country after committing a "serious criminal offense" as defined under the newly created section 1101(h) can be permanently excluded from the United States. Thus, Congress enacted section 1101(h), in part, to deal with the problem of diplomats who endanger public safety by driving a vehicle under the influence of alcohol. Notably, Congress did not provide a basis for *deporting* the diplomat for such conduct. Notably, section 1101(h) was part of a bill entitled, "Foreign Relations Authorization Act" and was particularly in a section entitled, "Diplomatic Immunity, Reciprocity, and Security." See, section 131, Pub. L. No. 101-246.

The Government's position poses a serious statutory construction problem for section 1101(h). Section (h) defines a serious criminal offense as: (1) any felony; (2) "any crime of violence, *as defined in section 16 of Title 18* or (3) any crime of reckless driving or of driving while intoxicated or under the influence of alcohol..." 8 U.S.C. §1101(h). So according to the Government and some lower courts, DUI is a crime under section 16. But if DUI is already a crime of violence under section 16, then it is a serious criminal offense under section (h)(2). But if DUI is already a crime under section (h)(2), then what's the purpose of section (h)(3). The Government's position renders section (h)(3) superfluous and is flatly wrong for this Court must give a construction to the statute that makes all terms relevant and sensible. *United States v. Smith*, 499 U.S. 160, 183 (1991) (citation omitted) ("[a] statute should be construed so that effect is given to all of its provisions, so that no part will be inoperative or superfluous, void or insignificant"); *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974) (explaining that the words of a particular clause of the statute are taken in connection with the whole statute "'and the objects and policy of the law, as indicated by its various provisions, [so as to] give to it such a construction as will carry into execution the will of the Legislature . . . .'"); *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805) ("It is undoubtedly a well established principle in the exposition of statutes, that every part is to be considered, and the intention of the legislature to be extracted from the whole.").

What's more likely? That Congress understood DUI to be a crime of violence under section 16 but nevertheless promulgated section 1101(h)(3) to make extra or doubly sure that DUI was a "serious criminal offense?" Or is it more likely that Congress never understood that DUI was a crime of violence under section 16. It's quite clear that Congress used the term "or" between section (h)(2) and (3). The latter construction makes much more sense in that Congress intended that DUI not be included as section 16 crime. See, *Clay v. United States*, 537 U.S. 522, 529 (2003)("When Congress includes particular language in one section of a statute but omits it in another section of the same Act, [this Court recognizes that] it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

This raises a very problematic issue of Congressional intent. If Congress intended DUI to be an aggravated felony under section 1101(a) – and more particularly section (a)(43)(F) – wouldn't it have done so when it was amending section 1101 to include new section (h) that in fact included DUI as a defined offense.

To point out another potential statutory misconstruction, section (h) specifically defines a serious criminal offense to include a section 16 crime of violence or DUI. So if Congress wanted to include DUI as a crime of violence in section 43(F), then Congress could have easily amended section 43(F) to refer to a serious criminal offense. That is, if section 43(F) referred to a serious criminal offense as defined by section (h), then that would have subsumed both section 16 violent crimes and DUI. An easy and expressed fix, but Congress never did so. Similarly, it could have copied the text of section (h) into section 43(F) too. It did neither.

The legislative history clearly shows that Congress knew about the perils of drunk driving but only provided for stripping drunk diplomats of immunity or barring re-

entry. Nothing in the legislative history of section (h) indicates that Congress even contemplated that DUI could be an offense under section 16 or 43(F). Rather, Congress only showed an interest in handling DUI in relation to diplomats. H.R. 101-17, 101st Cong. 2d. Sess. 98, reprinted in 1990 U.S.C.C.A.N. 56. As mentioned above, that DUI as a crime only appeared in connection with a diplomatic immunity issue is strong indication that Congress did not intend DUI to be imported into section 16.

(iii) Congress continued to amend the immigration laws to add more crimes but still never amended DUI to be a crime of violence or an aggravated felony.

In the same year that Congress enacted section 1101(h), Congress then passed the Immigration Act of 1990 (known as the IMMACT 90) that, aside from stripping certain aliens of discretionary deportation relief, included a term-of-sentence component into the definition of aggravated felony. Pub. L. No. 101-649. Congress did not redefine "aggravated felony" under immigration law or "crime of violence" under federal criminal law to include DUI.

Not to be undone, Congress then passed the Immigration Technical Correction Act of 1994. Pub. L. No. 103-416. This Act expanded the list of aggravated felonies to include less serious, but more common, crimes, such as fraud, burglary, and theft. See, section 222, Pub. L. No. 103-416. Congress did not redefine "aggravated felony" to include DUI even though it was redefining "aggravated felony" to include common crimes. The only legislative history on point is from then-President Clinton stating that the "Act also adds certain crimes to the definition of aggravated felony" and then goes on to discuss other aspects of the Act. Statement By President

William J. Clinton, Upon Signing H.R. 783 (25 Oct. 1994), reprinted in 1994 U.S.C.C.A.N. 3522-1-2.

In 1996, Congress passed the Anti-Terrorism & Effective Death Penalty Act of 1996 (the AEDPA). Pub. L. No. 104-132. Although the AEDPA was a response to the Oklahoma City bombing, it included an immigration law portion that amended section (43) to specifically expand the list of aggravated felonies including sections (43)(J, K, N, P, Q, R, S, O, and T). But yet again Congress did not specifically add DUI to the precise list of aggravated felonies, or amend section 43(F) itself to include DUI as a crime of violence. See also, *United States v. Culbert*, 435 U.S. 371, 378 n. 9 (1978)("We note that when Congress wanted to make racketeering an element of an offense, it knew how to do so.").

Congress then passed the Illegal Immigrant Reform & Immigrant Responsibility Act of 1996 (the IIRAIRA). Pub. L. No. 104-208. The IIRAIRA amended section (43) again. Congress added other aggravated felonies such as sections (43)(A, G, J, M, N, P, R, and S). But this time Congress amended section 43(F) to lower the term of imprisonment for a crime of violence to be an aggravated felony from five years to one. But yet again, Congress amended the very statute in question but failed to expressly include DUI as an aggravated felony. Congress specifically acted to amend the very statute in question but failed to redefine "aggravated felony" to include DUI. Congress did not amend section 16 either. Again, Congress could have simply amended section 43(F) to refer to serious criminal offenses as defined by section (h) because that would have included section 16 crimes of violence and DUI.

Congress never amended the general federal criminal law section 16, Congress amended the Immigration Act many times and added more than forty offenses to the definition of an aggravated felony. Congress added section 1101(h) to specifically enumerate

DUI as a serious criminal offense. So when asking the question of whether the immigration laws include DUI as a deportable offense, it's just common sense that with all the amending Congress did, Congress never intended DUI to qualify as a deportable offense. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 385-386- (1992)("A common-sense view of the word 'regulates' would lead to the conclusion that in order to regulate [a matter], a law ... must be specifically directed toward [it]"); also, *TRW v. Andrews*, 534 U.S. 19, 28 (2001)(stating the doctrine of "*expressio unius est exclusio alterius*" that "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.").

It is only judicial activism that has rammed DUI into the definition of a crime of violence so that it qualifies as a deportable offense. This belies the Congressional intent to not do so given the series of amendments Congress enacted. Where Congress amended the precise statute in question to enumerate more felonies yet still failed to add DUI into the statute, this further demonstrates that Congress did not intend to passively include DUI as a deportable offense. See, *Almendarez-Torres*, 523 U.S. at 234 (demonstrating the series of amendments to the Immigration Act that added new crimes and stating that "[t]he history, to our knowledge, contains no language at all that indicates Congress intended to create a new substantive crime."). Even though the inclusion of a crime of violence under section 16 as aggravated felony could be seen as some type of "catch-more" statute designed to sweep up other crimes not specifically enumerated, it is simply unreasonable to conclude that Congress meant to sweep up DUI as an aggravated felony under section 16 in light of the legislative history demonstrating that – despite many opportunities – Congress never designated DUI as a deportable offense.

The *Culbert* case, 435 U.S. 371 (1978), albeit in another context, is particularly instructive. In this case, the defendant was charged with violating the Hobbs Act, 18 U.S.C. §1951 (for bank robbery) and argued that the Government must also show he engaged in racketeering as an element to a Hobbs Act violation. This Court held that nothing in the plain language of the statute required the Government to prove racketeering as a basis for a Hobbs Act violation. The legislative history showed that Congress had enacted a prior racketeering statute, the Anti-Racketeering Act of 1934, 48 Stat. 979. *Culbert*, 435 U.S. at 1114-15. When Congress passed the Hobbs Act, it was well aware of racketeering but "nowhere mentioned racketeering." *Id.* at 1114-15. Continuing to analyze the legislative history, this Court noted that "Congress simply did not intend to make racketeering a separate, unstated element of an Anti-Racketeering Act violation." *Id.* at 376. In construing the legislative history of the Hobbs Act, the Court examined and denounced the argument that racketeering was a predicate to a Hobbs Act violation. Particularly noting that the Hobbs Act came later in time, this Court said, "[i]t is inconceivable that, at the same time Congress was so concerned about clearly defining the acts prohibited under the bill it intended to make proof of racketeering – a term not mentioned in the statute – a separate prerequisite to criminal liability under the Hobbs Act." *Id.* at 378.

Analogizing to *Culbert*, here Congress manifestly said nothing about DUI in any statute or amendment prior to implementing section 1101(h). In promulgating section 1101(h), Congress was only concerned about DUI in relation to diplomats. Congress knew it could have added DUI to section 16 or section (a) but did not do so. In the same regard, Congress' only concern was for diplomatic DUI violations.

(iv) Punishing DUI as a deportable offense is grossly disproportionate and raises Due Process problems.

The Due Process Clause of the Fifth Amendment forbids retroactive legislation when the "retroactive application [of the statute] is so harsh and oppressive as to transgress the constitutional limitation." *United States v. Carlton*, 512 U.S. 26, 30. Retroactive legislation "presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions." *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992). Thus, due process "protects the interests in fair notice and repose that may be compromised by retroactive legislation." *Landgraf v. USI Film Prod.*, 511 U.S. 244, 266 (1999). "[R]etrospective laws are, indeed generally unjust; and... neither accord with sound legislation nor with the fundamental principles of the social compact." 2 J. Story, Commentaries on the Constitution § 1398 (5th ed. 1891) (quoted in *Eastern Enterprises v. Apfel*, 524 U.S. 498, 533 (1998)). The constitutionality of retroactive legislation is "conditioned upon a rationality requirement beyond that applied to other legislation." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 223 (1988) (Scalia, J., concurring).

Here, the retroactive defining of DUI to be an aggravated felony would upset settled expectations and throw into uncertainty thousands, if not millions, of cases. DUI offenses are, sadly, among the most common of criminal offenses. If these offenses are aggravated felonies (and have been aggravated felonies since 1996, if not 1990), this would have severe and significant implications for immigration law.

The clearest and most immediate effect of a new definition would be to render thousands of foreign nationals – productive members of society, parents and children and spouses of Americans, who are supporting the country and paying taxes – removable as "aggravated felons." The retroactive application of such a definition would render deportable legal residents who have

established their lives, their families, and their futures in United States. See *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977). See also Jill Fisch, Retroactivity and Legal Change: An Equilibrium Approach, 110 HARV. L. REV. 1055, 1102 (1997) (noting that retroactivity creates the most social cost when it upsets a stable equilibrium because the longer a rule is in effect, and the longer people have had to build their lives around that rule, the more disruptive it will be if the government is permitted to reach back and alter that rule). Where the offense predates 1996, foreign nationals might be eligible to apply for relief under former INA § 212(c), pursuant to this Court's decision in *INS v. St. Cyr*, 533 U.S. 289 (2001), but other long-time residents of this country (particularly those who committed DUI offenses from 1996 onwards) would have no available relief from removal: for such individuals, removal would be automatic.

Such individuals would be forever inadmissible to return legally to this country. The inadmissibility statute, 8 U.S.C. § 1182(h), forbids the issuance of a waiver of criminal grounds of inadmissibility to any former permanent resident who has ever committed an aggravated felony. No matter what hardship is caused to the individual's family members, no matter how many years earlier the crime was committed, such an individual is permanently banished.

A smaller category of affected individuals would include persons who were granted residency status, but who could not have been admitted if DUI offenses were interpreted to be aggravated felonies. Despite final administrative action in such cases, such individuals would be subject to immediate removal, as the Immigration and Nationality Act contains a specific section rendering removable persons who were "inadmissible at time of admission." 8 U.S.C. §1227(a)(1).

While it is true that statutory interpretations are usually retroactive, retroactive application of new interpretations has sometimes been held to be inappropriate. See, e.g., *Warner Jenkinson v. Hilton Davis*, 520 U.S. 17, 28 (1997) (Courts must be cautious about adopting changes that disrupt settled expectations of the [inventing] community), and 520 U.S. at 32 (Ginsburg, J. concurring)("The new presumption, if applied woodenly, might in some instances unfairly discount the expectations of a patentee who had no notice at the time...that such a presumption would apply."). In *Chevron Oil Co. v. Huson*, 404 U.S. 97, 105-109 (1971), the Court set forth three criteria for determining when to apply a decision of statutory interpretation prospectively.

> First, the decision to be applied nonretroactively must establish a new principle of law ***. Second, it has been stressed that we must weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. Finally, we have weighed the inequity imposed by retroactive application, for where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity.

Id. (citations omitted). As *Amicus* argues below, retroactive application of this rule would produce unjust and inequitable results, and would trigger grave Due Process concerns.

Five years ago, a majority of this Court struck down as unconstitutional a statute that required

companies formerly in the coal industry to retroactively assume responsibility for coal miners' benefits. *Eastern Enter. v. Apfel*, 524 U.S. 498 (1998). While a plurality of the Court (four justices), resolved the issue on takings grounds, and the Court did not reach the question "whether the Coal Act violates due process in light of the Act's severely retroactive impact," *Eastern Enter.*, 524 U.S. at 537, a majority of the Court focused on the absence of a time limitation on the retroactive reach of the statute. Drawing from due process retroactivity jurisprudence, the plurality opinion noted that the Court's decisions "have left open the possibility that legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience." Id. at 528-29. Justice Kennedy, concurring in the judgment would have found the Coal Act violative of due process because "in creating liability for events which occurred 35 years ago the Coal Act has a retroactive effect of unprecedented scope." Id. at 549. Justice Kennedy emphasized that the due process right against retroactive legislation reflects the Court's "recognition that retroactive law making is a particular concern for the courts because of the legislative 'temptation to use retroactive legislation as a means of retribution against unpopular groups or individuals.' " Id. (quoting *Landgraf*, 511 U.S. at 266).

In this case, a retroactive ruling that DUI offenses are aggravated felonies, which results in removability from the country and in many cases results in automatic removal, profoundly disrupts the expectations of legal permanent residents who, with the consent of the prosecution, chose to plead guilty to crimes that did not render them deportable. As in *St. Cyr*, such a retroactive interpretation would alter the "quid pro quo between a criminal defendant and the government." *St. Cyr*, 533 U.S. at 321. Many legal aliens pled guilty to such

offenses relying on the then-existing immigration consequences of their conviction. *St. Cyr*, 533 U.S. at 322 (citing *Magana-Pizano v. INS*, 200 F.3d 603, 612 (9th Cir. 1999) ("That an alien charged with a crime . . . would factor the immigration consequences of conviction in deciding whether to plead or proceed to trial is well-documented."). Furthermore, particularly where dealing with misdemeanor offenses such as DUI, these grounds for deportation "reach into parts of the criminal justice system where it has been routine for lawyers and judges to treat cases relatively casually. In a situation where no one expected the stakes to be high, a case may well have been disposed of in minutes." Nancy Morawetz, Rethinking retroactive deportation laws and the Due Process Clause, 73 N.Y.U. L. REV. 97,119 (1998). By so drastically increasing the legal consequences to be bourne by an immigrant who enters a guilty plea, the retroactive interpretation urged by the Government would contravene "elementary considerations of fairness [that] dictate that individuals have an opportunity to know what the law is and conform their conduct accordingly." n18 *Landgraf*, 511 U.S. at 265.

Amicus would urge that the constitutional concerns should be considered as the Court interprets 18 U.S.C. § 16, as the Court traditionally interprets statutes, where possible, to avoid interpretations that raise "grave doubt" about the statute's constitutionality. *Zadvydas v. Davis*, 533 U.S. 678, 699 (2001); *Crowell v. Benson*, 285 U.S. 22, 62 (1932); *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916); see also *United States v. Ubaldo-Figueroa*, 2003 WL 23355650 (9th Cir., 07 Apr. 2004).

E. CONCLUSION

For these reasons, the Congress did not intend to engraft DUI into section 16 as it did not intend that DUI be a crime of violence warranting deportation. The Amicus respectfully request that this Court reverse the judgment of the 11th Circuit, nold that DUI is not a crime of violence under section 16, hold that DUI is not an aggravated felony within the meaning of the section 1101(a), and hence is not a deportable offense.

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Supreme Court of the United States

JOSUE LEOCAL,

Petitioner,

v.

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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IN THE

Supreme Court of the United States

No. 03-583

JOSUE LEOCAL,

Petitioner,

v.

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, ET AL., AS AMICI CURIAE SUPPORTING PETITIONER

INTEREST OF THE AMICI CURIAE[1]

Amici are legal defense and civil rights organizations that encompass practitioners, scholars, and policy advocates in the areas of criminal law, immigration, and civil liberties. These organizations have purposes and expertise that range across both immigration law and federal criminal law, but all share a deep commitment to the just, equitable, and uniform application of this nation's laws in both the criminal justice

[1] Amici curiae state that no party or its counsel has authored this brief in whole or in part, and no person or entity other than amici, their members, or their counsel have made any monetary contribution to its preparation. This brief is filed with the consent of all parties, and copies of the consent letters have been lodged with the Clerk of the Court

and immigration arenas. Collectively, these organizations represent considerable experience and expertise in the areas at issue in this appeal. This brief is respectfully submitted to inform the Court of the considered views of this community of criminal and immigration legal experts who work every day with the legal questions at issue in this case.

Amici are concerned that the Court's decision as to whether the petitioner's offense in this case constitutes a "crime of violence" and therefore an aggravated felony under the immigration laws has the potential to undermine the reasonable expectations of immigrant defendants—many of them advised by counsel who are members of amici organizations—who pled guilty based on current law in jurisdictions other than the Eleventh Circuit. Affirmance of the decision below—which, amici respectfully submit, misapplies federal statutory law and is inconsistent with the holdings of most federal courts of appeals that have considered the issues at hand—would undermine the reliability of past legal advice, and lead to a dramatic curtailment of the ability of past, present, and future immigrants to avoid mandatory detention, deportation, and separation from lives and families here in the United States.

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit corporation with more than 11,400 members nationwide and 28,000 affiliate members in 50 states, including private criminal defense attorneys, public defenders, and law professors. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates. NACDL was founded in 1958 to promote criminal-law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal-defense counsel. NACDL is particularly dedicated to advancing the proper, efficient, and just administration of justice, including issues involving the immigration consequences of criminal proceedings.

The American Civil Liberties Union ("ACLU") is a national, nonprofit, nonpartisan organization of more than 400,000 members dedicated to protecting the fundamental rights and principles of individual liberty embodied in the Constitution and laws of the United States. Since its founding in 1920, the ACLU has defended the rights of noncitizens. The Immigrants' Rights Project of the ACLU engages in a nationwide program of litigation and advocacy on behalf of immigrants and has litigated numerous cases addressing the consequences faced by immigrants with criminal convictions. Because of the severe substantive and procedural consequences for immigrants who are convicted of a crime determined to be an "aggravated felony," the proper construction of that term raises important civil liberties issues and is essential to preserving rights guaranteed by our immigration laws and the Constitution.

The American Immigration Lawyers Association ("AILA") is a national non-profit association of immigration and nationality lawyers. Founded in 1946, AILA is an affiliated organization of the American Bar Association. It now has more than 8,500 members organized in 35 chapters across the United States and in Canada. AILA's members' clients may be directly affected by the decision in this case.

The Defending Immigrants Partnership ("DIP") is a national program bringing together immigration law experts and defense counsel to ensure that noncitizen defendants have meaningful access to justice. To that end, DIP educates and trains public defenders and assigned counsel on the law relating to citizenship, immigrant status, and the immigration consequences of convictions, and offers technical assistance on individual cases and efforts to develop immigration expertise in defender programs. DIP provides cutting-edge legal analysis, resources, advocacy, and amicus assistance on the proper interpretation of the immigration laws.

The New York State Defenders Association ("NYSDA") is a non-profit membership association of more than 1,300 public defenders, legal aid attorneys, assigned counsel, and others throughout the State of New York. Its

objectives are to improve the quality of public defense services in the state, establish standards for practice in the representation of poor people, and engage in a statewide program of community legal education. Among other initiatives, NYSDA operates the Immigrant Defense Project, which provides immigrants and their lawyers with legal research and consultation, publications, and training on issues involving the interplay between criminal and immigration law.

STATEMENT OF THE CASE

The case arises out of the removal of Petitioner Josue Leocal, a lawful permanent resident who was removed from the United States after 20 years of law-abiding residence here and thereby separated from his wife and children—all American citizens.

Leocal, a native and citizen of Haiti, immigrated to the United States in 1980 at the age of 24, and became a lawful permanent resident in December 1987. In January 2000, he was involved in a car accident in Miami-Dade County, Florida. Two people were injured in the accident; one required hospitalization. Leocal was arrested in connection with the accident and subsequently pleaded guilty to two counts of driving under the influence causing serious bodily injury in violation of Fla. Stat. Ann. § 316.193(3)(c)(2) ("DUI with injury" or "Florida DUI").

On October 16, 2001, while he was serving his sentence, an Immigration Judge ("IJ") held that Petitioner was removable, on the ground that his offense of conviction was an aggravated felony pursuant to 8 U.S.C. § 1101(A)(43)(F), because the offense was a "crime of violence" within the definition of 18 U.S.C. § 16(a). In making this determination, the IJ relied upon a decision of the Eleventh Circuit, *Le* v. *Attorney General*, 196 F.3d 1352 (11th Cir. 1999) (per curiam), because the proceeding arose within the Eleventh Circuit. The *Le* court had in turn relied upon the Board of Immigration Appeals ("BIA")'s decision in *In re Puente-Salazar*, 23 I. & N. Dec. (BIA 1999), which had concluded

that a similar Texas DUI statute was a "crime of violence" within the meaning of 18 U.S.C. § 16.

Leocal timely appealed the IJ's decision to the BIA. Before Leocal received a decision from his appeal, the BIA issued *In re Ramos*, 23 I. & N. Dec. 336 (BIA Apr. 4, 2002) (en banc), which reversed *In re Puente-Salazar* and held that DUI offenses that did not have a *mens rea* of at least recklessness were not "crimes of violence" within the definition of § 16. Leocal urged the BIA to reconsider its decision in light of *Ramos*. The BIA reopened Leocal's case, vacated its previous order, and issued a new order. In the new order, the BIA stated that although Leocal's offense would not be considered a "crime of violence" under the analysis set forth in *Ramos*, it was nonetheless bound to follow *Le*. The BIA accordingly affirmed the IJ.

On Leocal's appeal, the Eleventh Circuit affirmed the BIA and dismissed the petition in an unpublished per curiam opinion. The Eleventh Circuit examined *Le*, and concluded that, notwithstanding the *Le* court's discussion of deference, the panel in *Le* had in fact reviewed the statute in question *de novo* and had independently concluded that the Florida DUI statute was a "crime of violence" within the definition of 18 U.S.C. § 16(a). The Eleventh Circuit therefore held that it was bound by *Le*, regardless of the BIA's amended interpretation. This Court granted *certiorari* on February 23, 2004. *See* 124 S. Ct. 1405 (2004).

SUMMARY OF ARGUMENT

The Eleventh Circuit concluded that the Florida DUI statute was a "crime of violence" within the meaning of 18 U.S.C. § 16(a). This was error, for two reasons:

First, § 16(a) by its express terms only applies to those offenses that have the use of force as an "element." The Florida DUI statute does not contain any such element, and that statute's separate element (requiring that the intoxicated defendant have caused injury) is not coterminous with a "use of force" element.

Second, the everyday meaning of "use," including as that term has been construed by this Court in *Bailey* v. *United States*, 516 U.S. 137 (1995), connotes intentional action by the subject. The Florida DUI statute does not contain any such requirement of intentional or volitional action, and indeed, under state decisional law, can be violated without a showing of any *mens rea*. The absence of any intent requirement in the Florida DUI statute means that that statute, under canons of construction requiring that statutory text be given its plain meaning, cannot constitute a "crime of violence" under § 16(a). The available legislative history forcefully supports this interpretation. The Senate Report accompanying the passage of 18 U.S.C. § 16 specifically noted that the meaning of "crime of violence" in § 16 was "essentially the same" as a previous use of that term to describe enumerated offenses, each of which was a specific intent (volitional) crime.

Should the Court hold that the Florida DUI statute is not a "crime of violence" under § 16(a), the proper course would be to exercise its discretion and not reach the issue whether Florida DUI falls within § 16(b). That issue has not been considered by the IJ, the BIA, the Eleventh Circuit, or any district court in that circuit, and this Court's consideration of whether Florida DUI falls under § 16(b) should await mature consideration of that issue by other courts. However, if the Court does reach the § 16(b) issue, amici submit that the approach taken by the majority of circuit courts (holding that offenses under state statutes that appear to be similar to Florida DUI do not constitute "crimes of violence" under that provision either) is clearly correct. By its text, § 16(b) also mandates a categorical approach, providing that an offense is a "crime of violence" only if, "by its nature," it entails a "substantial risk" that force will—intentionally—be used. Florida DUI does not satisfy that standard.

Finally, because of the profoundly grave consequences of being deemed an "aggravated felon" under the INA, this Court's longstanding principle of construing criminal and

immigration statutes according to the rule of lenity should guide the Court's analysis here.

ARGUMENT

The Immigration and Nationality Act ("INA" or "the Act") mandates the deportation of virtually any alien convicted of an "aggravated felony." *See* 8 U.S.C. § 1227(a)(2)(A)(iii). An "aggravated felony," in turn, is defined to include "any crime of violence (as defined in section 16 of title 18) . . . for which the term of imprisonment is least one year." Congress has defined "crime of violence" in 18 U.S.C. § 16 as:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force may be used in the course of committing the offense.

In this case, Petitioner was convicted in Florida of the offense of driving under the influence causing serious bodily injury to another, in violation of Fla. Stat. Ann. § 316.193(3)(c)(2). The Eleventh Circuit, following its precedent in *Le* v. *Attorney General*, 196 F.3d 1352 (11th Cir. 1999), held that Florida DUI constitutes a "crime of violence" as defined in § 16(a). It accordingly held that Petitioner was required to be removed from the United States.

The decision below is wrong in two key respects. First, although § 16(a) requires the offense to have as an element the "use of physical force," the Florida DUI statute does not contain any such element. And the Florida DUI statute's separate element—requiring that the offense have caused harm—is legally distinct from a "use of force" element, as the courts of appeals that have considered that issue closely have persuasively held. Second, again as the courts of appeals have largely recognized, for an offense to be a "crime of violence" under § 16(a), the defendant must have been required to have acted intentionally. But Florida DUI does

not contain any requirement of intentional action; indeed, to support a conviction, Florida DUI does not even require a finding of recklessness or negligence. For these two independent reasons, Florida DUI thus does not constitute a "crime of violence" under § 16(a).

The Eleventh Circuit did not have occasion to consider whether Florida DUI would constitute a "crime of violence" under § 16(b). As amici note in this brief, should the Court hold that Florida DUI is not a "crime of violence" under § 16(a), the better course jurisprudentially would be for the Court to avoid that issue, rather than address the application of § 16(b) to that particular state statute without the benefit of lower-court review. However, should the Court reach the § 16(b) issue, we note that Florida DUI clearly would also fall outside the scope of § 16(b), again as all but one of the courts of appeals to consider parallel state DUI statutes have held.

I. SECTION 16(a) DOES NOT ENCOMPASS DUI STATUTES THAT DO NOT HAVE THE "USE OF FORCE" AS AN ELEMENT, AND THE ELEMENT OF CAUSATION OF INJURY IS NOT A SUBSTITUTE FOR THAT REQUIRED ELEMENT.

Section 16(a) defines a "crime of violence" as an "offense that *has as an element* the use, attempted use, or threatened use of physical force against the person or property of another" (emphasis added). As the courts of appeals have uniformly held, this formulation—focused on statutory elements rather than the proof in a particular case—requires a court reviewing an alien's conviction to focus on whether the elements of the statute of conviction necessarily contain the elements required by § 16(a). *See, e.g., Flores* v. *Ashcroft*, 350 F.3d 666, 670 (7th Cir. 2003) (applying elements test under § 16(a)); *Chrzanoski* v. *Ashcroft*, 327 F.3d 188, 195-196 (2d Cir. 2003) (same); *Ramsey* v. *INS*, 55 F.3d 580, 583 (11th Cir. 1995).

As these appellate courts have recognized, the proper focus under § 16(a) is therefore on the minimum criminal conduct necessary to sustain a conviction under the statute. *See, e.g., Flores*, 350 F.3d at 671 (§ 16(a) requires courts to look at the elements of the offense, and not defendant's actual conduct); *Chrzanoski*, 327 F.3d at 191 (same). Under this "categorical" approach, the specific facts underlying the conviction are not examined and are irrelevant. *See, e.g., Taylor* v. *United States*, 495 U.S. 575, 600-601 (1990) (applying categorical analysis in context of analogous statute and declining to look to facts of underlying conviction); *Flores*, 350 F.3d at 670 ("element" language in § 16(a) requires categorical approach); *Bazan-Reyes* v. *INS*, 256 F.3d 600, 606 (7th Cir. 2001); *Ramsey*, 55 F.3d at 583.

In this case, the pertinent element required by § 16(a) relates to the "use of force." Section 16(a) requires that the statute of conviction have "*as an element* the use, attempted use, or threatened use of physical force against the person or property of another" (emphasis added). *See, e.g., United States* v. *Martin*, 215 F.3d 470, 473-474 (4th Cir. 2000) (ruling that bank larceny was not a "crime of violence" because it "lacks as a statutory element not only the use of force, violence, or intimidation, but also the taking from the person or presence of another"); *United States* v. *Wilson*, 951 F.2d 586, 588 (4th Cir. 1991) ("[T]he court simply reads the statutory or common law definitions . . . to see whether they list as an element the 'use . . . of physical force.' ").

The words "use of force," however, do not appear anywhere in Florida DUI. Under Florida law, the Florida DUI offense of which Petitioner was convicted requires proof of only three elements: (i) intoxication; (ii) the operation or control of a vehicle; and (iii) the causation of injury. The Florida DUI statute does not contain either (1) an element requiring the "use of force" or (2) a *mens rea* element. *See* Fla. Stat. Ann. § 316.193(3)(c)(2); *State* v. *Hubbard*, 751 So. 2d 552, 556-557 (Fla. 1999); *Baltrus* v. *State*, 571 So.2d 75-76 (Fla. Dist. Ct. App. 1990); *cf. Standard Jury Instructions in Crim. Cases (97-2)*, 723 So. 2d 123, 146-147 (Fla. 1998).

Florida DUI is typical in this respect of the DUI statutes of many other states. And the federal courts of appeals to consider such statutes have largely held that such DUI statutes do not fall within § 16(a). *See Bazan-Reyes*, 256

F.3d at 609; *see also United States* v. *Vargas-Duran*, 356 F.3d 598, 603 (5th Cir. 2004) (en banc) (holding that Texas Intoxication Assault offense was not a "crime of violence" under identically worded Sentencing Guideline provision); *United States* v. *Rutherford*, 54 F.3d 370, 372 (7th Cir. 1995); *cf. United States* v. *Trinidad-Aquino*, 259 F.3d 1140, 1144-1145 (9th Cir. 2001) (holding that offense of California DUI causing injury to another was not crime of violence under § 16(a)). *But see Le*, 196 F.3d at 1354 (classifying Florida DUI statute as "crime of violence"). Amici respectfully submit that this Court should adopt this majority view and hold—based, quite simply, on the absence of this required element from the Florida DUI statute—that § 16(a) does not apply to such statutes.

In its sole statement on this issue, in its per curiam decision in *Le*, the Eleventh Circuit observed that Florida DUI contains as an element that the defendant have "caused injury." *See Le*, 196 F.3d at 1354. This observation was *Le*'s sole basis for treating Florida DUI as a "crime of violence." But the "use of force" element and "causation of injury" element are not coextensive, and thus—contrary to the Eleventh Circuit's summary, unexamined conclusion—the Florida DUI statute does not come within § 16(a).

The Second Circuit's decision and analysis in *Chrzanoski* v. *Ashcroft*, 327 F.3d 188 (2d Cir. 2003), forcefully underscore this point. At issue in *Chrzanoski* was the Connecticut offense of third degree assault, which did not contain a "use of force" element, but which did expressly require the defendant to have caused injury. *Id.* at 192-193. The court rejected the government's contention that "use of force" was implicit in the statutory element of injury causation. Its analysis began with its earlier decision in *Dalton* v. *Ashcroft*, 257 F.3d 200 (2d Cir. 2001). In *Dalton*, the Second Circuit had held that New York State's DUI statute did not come within § 16(b), because whereas the New York statute covered conduct that presented a "risk of injury," that risk was different from the "risk of the use of physical force." The *Chrzanoski* court rejected the notion that there was

only a "negligible difference" between the two concepts. 327 F.3d at 194. The Second Circuit in *Dalton* had explained:

> While it may be true that all driving involves some risk of an accident and drunk driving increases that risk, upon closer examination, this reasoning begs the question of whether an accident is something that can be referred to as involving the "use of physical force." Such an argument equates the use of physical force with harm or injury, thus returning the inquiry to the question of whether there is any material difference between the risk of "the use of physical force" and the "risk of injury." . . . There are many crimes that involve a substantial risk of injury but do not involve the use of force. Crimes of gross negligence or reckless endangerment, such as leaving an infant alone near a pool, involve a risk of injury without the use of force. . . . Other courts have also recognized the logical fallacy inherent in reasoning that simply because all conduct involving a risk of the use of physical force also involves a risk of injury then the converse must be true.

Chrzanoski, 327 F.3d at 194-195 (quoting *Dalton*, 257 F.3d at 207 (citations and footnotes omitted)).

The *Chrzanoski* court concluded that the same reasoning applies to § 16(a). Like § 16(b), § 16(a) requires the "use of force," not simply the causation of injury. 327 F.3d at 195-196 (citations omitted); *see also Flores*, 350 F.3d at 671; *United States* v. *Gracia-Cantu*, 302 F.3d 308, 312 (5th Cir. 2002) (noting government's concession that statute criminalizing injury to a child did not require application of force as an element).

For these reasons, as the Seventh Circuit has explained, for an offense to constitute a "crime of violence" under § 16(a), the use of force must truly be an *element* of the offense, rather than being a mere possibility or even a probability inferred from the fact that the defendant caused injury. *See Flores*, 350 F.3d at 671-672. In *Flores*, the Seventh Circuit, per Judge Easterbrook, rejected the govern-

ment's claim that an Indiana battery conviction based on a state statute that defined battery as " 'knowingly or intentionally touch[ing] another person in a rude, insolent, or angry manner, . . . result[ing] in bodily injury to any another person,' " had use of force as an element such that it was a "crime of violence." *Id.* at 669 (quoting Ind. Code § 35-42-2-1). While acknowledging that "both touching and injury have a logical relation to the 'use of force,' " the Court emphasized that the State law "does not make intent to injure an element of the offense; intent to *touch* must be established, but not intent to injure." *Id.* at 671 (emphasis in original) ("It may well be that acts designed to injure deserve the appellation 'violent' because the intent makes an actual injury more likely; it does not follow that accidental hurts should be treated the same way."). The Court refused to equate touching with force because to do so "would make hash of the effort to distinguish ordinary crimes from violent ones." *Id.* at 672. Though Flores's acts "were on the 'force' side of this legal line," they did not constitute a "crime of violence" because "the elements of his *offense* are on the 'contact' side." *Id.* at 673 (emphasis in original).

This reasoning is equally applicable to the offense of Florida DUI. Conviction under that statute for causing injury or death is not contingent on force having been used. Instead, the statute provides, in relevant part:

> (3) Any person:
>
> (a) Who is in violation of subsection (1) [by driving or being "in actual control of a vehicle" while legally intoxicated];
>
> (b) Who operates a vehicle; and
>
> (c) Who, by reason of such operation, causes or contributes to causing:
>
> * * * *
>
> Serious bodily injury to another . . . commits a felony of the third degree

Fla. Stat. Ann. § 316.193(3).

Florida decisional law makes clear that the statute can be violated without any "use of force." Indeed, under Florida law, one can be convicted of DUI without even driving—having "control" of the vehicle suffices.[2]—and there is no *mens rea* requirement, the Florida Supreme Court having held that Florida DUI crimes are essentially strict liability offenses. *Hubbard*, 751 So. 2d at 556-557. As a result, for example, Florida DUI could apply in the following scenarios, none of which entails a use of force:

- An intoxicated person stops his car in harm's way, for example, alongside a highway median or opposite oncoming traffic. The stationary car is then struck by another vehicle, causing injury. *See, e.g.*, *Griffin* v. *State*, 457 So. 2d 1070, 1071 (Fla. Dist. Ct. App. 1984) (per curiam) (sufficient grounds exist to show actual physical control for purpose of DUI liability where car is parked in a lane of traffic facing the wrong direction, key is in the ignition, the lights are on, and defendant is stepping on the brake).
- An intoxicated person leaves his car in a place where a duty to move the car will eventually arise, for example, a lane whose traffic direction changes at rush hour. The driver neglects to move his car, and it is struck by another driver.
- An intoxicated driver swerves negligently onto (or towards) the sidewalk. A pedestrian sees the car swerving towards him, and, to avoid being struck, jumps away from the car. Although there is no contact with the car, the pedestrian falls and is "seriously injured" within the meaning of the Florida statute.

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[2] *See Baltrus*, 571 So. 2d 75 (defendant was in physical control of vehicle when found slumped over steering wheel, asleep in driver's seat, in a parking lot, with car's keys in his hand); *Mitchell* v. *State*, 538 So. 2d 106, 107 (Fla. Dist. Ct. App. 1989) (sleeping in parked car's driver's seat, slumped over steering wheel, with keys in the ignition and a hand on the wheel constitutes actual physical control).

- Same hypothetical as immediately above, except that the injured party is a driver of another car that has swerved to get out of the way of the car driven by the intoxicated driver.

The "causation of injury" element of Florida DUI thus cannot serve as a surrogate for the "use of force" required by § 16(a). This is so for a second, independent reason. As we note in Section II of this brief, the § 16(a) term "use of force" presupposes the "active employment" (i.e., intentional) use of such force. *See infra* pp. 14-17. But the injury-causation element of Florida DUI does not contain any requirement of intentional action, let alone intentional employment of force, and therefore cannot satisfy the requirements of § 16(a). *See Bazan-Reyes*, 256 F.3d at 609 ("Although a conviction for homicide by intoxicated use of a vehicle [under the Wisconsin statute] requires that the offender actually hit someone, it does not require that he intentionally used force to achieve that result."); *cf., e.g., Chrzanoski*, 327 F.3d at 193-194 (distinguishing force and injury (citing *Dalton*, 257 F.3d at 202-203)).

II. AN OFFENSE IS NOT A "CRIME OF VIOLENCE" WITHIN THE MEANING OF § 16(a) UNLESS THE OFFENSE REQUIRES INTENTIONAL DEPLOYMENT OF FORCE, AN ELEMENT MISSING FROM FLORIDA DUI.

A. The Plain Language Of The Statutory Phrase "Use Of Force" Unambiguously Limits The Scope Of The "Crime Of Violence" Definition To Specific Intent Offenses.

In identifying the offenses that would be deemed "crimes of violence" under § 16(a), Congress extended the provision to offenses having as an element "the *use*, attempted *use*, or threatened *use* of physical force against the person or property of another" (emphasis added). This definition is drawn considerably more narrowly than it might have been. Rather than employ the "use" formulation, Congress might have included offenses where "force"—defined as "[p]ower, violence, or pressure directed against a person or thing," Black's Law Dictionary 656 (7th ed. 1999)—was

"present," or where physical force "caused injury." But the statutory language that Congress chose demands something more for an offense to be a "crime of violence": the "use" (or "attempted" or "threatened" use) of physical force. The plain meaning of this familiar phrase makes clear that the statute applies only where the defendant had a specific intent to bring physical force to bear. The inadvertent, unintended, or accidental deployment of force—which is the conduct covered by Florida DUI and comparable statutes in other states—is simply not a crime of violence under § 16(a)

This Court has previously had occasion to consider the construction of the statutory term "use." It has held that "[t]he word 'use' must be given its 'ordinary or natural' meaning, a meaning variously defined as '[t]o convert to one's service,' 'to employ,' 'to avail oneself of,' and 'to carry out a purpose or action by means of.' " *United States* v. *Bailey*, 516 U.S. 137, 145 (1995) (citations omitted).[3] Consistent with this, the Oxford English Dictionary defines "use" as "[t]he act of employing a thing for any . . . *purpose*; . . . utilization or employment for or with some *aim or purpose*, application or conversion *to some . . . end*." 19 Oxford English Dictionary 350 (2d ed. 1989) (emphasis added), *quoted in Vargas-Duran*, 356 F.3d at 602. The "use of force" necessarily extends only to offenses where there was a specific intent to apply force. *See, e.g., Rutherford*, 54 F.3d 370 ("In ordinary English, the word 'use' implies intentional availment.");

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[3] In *Bailey*, this Court addressed 18 U.S.C. § 924(c)(1), which requires courts to impose certain penalties if a defendant "during and in relation to any crime of violence or drug trafficking crime . . ., uses or carries a firearm." The Court construed "use" to require active employment, and reversed two convictions because in each case, the evidence only proved that the defendant was in proximity to, and had access to, a firearm during the commission of a drug trafficking crime. 516 U.S. at 145 (noting that the "various definitions of 'use' imply action and implementation"). Indeed, Justice O'Connor, writing for a unanimous Court, specifically rejected the proposition that mere "storage," which of course could be accomplished through negligence, would constitute "use." *Id.* at 149.

Vargas-Duran, 356 F.3d at 603 ("[T]he plain meaning of the word 'use' requires intent.").

Efforts to avoid this ordinary and natural meaning, and to describe the unintended exertion of force as a "use" of force, lead inevitably to non sequiturs. As the Seventh Circuit has memorably observed:

> Force is exerted in many instances where it is not employed for any particular purpose. For example, earthquakes and avalanches involve the exertion of a tremendous amount of force. Such disasters, however, are freaks of nature; we can identify no intelligence or purpose behind them. Referring to a randomly occurring avalanche as a "use" would torture the English language.

Rutherford, 54 F.3d at 372-373.

It is equally torturous to apply the term "use" to accidental human conduct. A person who intentionally shoves another person has clearly "used" force—but the same simply cannot be said of a person who inadvertently stumbles into another person. Even if an equivalent level of force is involved in both cases, it is "used" only in the first instance. And nothing changes if the person who non-deliberately applies force is under the influence of alcohol—an inebriated person who shoves another on purpose "uses" force, while an inebriated person who trips and lands on another does not.

To be sure, the "use" of an automobile in a manner that causes injury may well involve "force" in many cases—often with tragic consequences. But it is wrong to equate the use of an automobile in a manner that *unintentionally* results in the application of force to a person or property with the "use of force" as the phrase is used in § 16(a) to define "crimes of violence." It would not be said of a sober person who accidentally drove into a tree that he "used force" against the tree, because although he intentionally availed himself of the automobile, he did not intentionally avail himself of the automobile's force to destroy the tree. A person driving under the influence of alcohol may be more irresponsible, but that fact does not transform the accidental result of his intentional use of a car into an intentional use of force against the same tree.

All of these circumstances, of course, are to be distinguished from those occasions when people behind the wheel of a car *do* intentionally use force. Someone who deliberately runs another car off the road clearly "uses" or "attempts to use" force. But no matter how negligent or reckless an impaired driver is, there is no "use" of force when the same end occurs as part of an accident.

Section 16(a)'s inclusion of offenses involving attempted or threatened uses of force further demonstrates that "use" requires intent. Both attempts and threats require specific intent. *See Vargas-Duran*, 356 F.3d at 603; *Rutherford*, 54 F.3d at 373 (placement of threats and attempts alongside "use" evidenced that provision covered only intentional acts); Black's Law Dictionary 123 (7th ed. 1999) (defining "attempt" as the "act or an instance of making an effort to accomplish something"); *id.* at 1489 (defining "threat" as a "communicated intent to inflict harm or loss on another or on another's property"). The juxtaposition of "use," "attempted use," and "threatened use" indicates that the terms should be read as requiring a similar *mens rea*. *See Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 575 (1995) ("[A] word is known by the company it keeps.").[4]

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[4] Requiring intent for attempted and threatened use of force, but not for use of force, would make § 16 nonsensical:

> [T]he word "use" must have an operative effect when left standing alone, or when modified by either "attempted" or "threatened." Both an attempt and a threat require intent. Were we to interpret "use of force" inconsistently with its plain meaning—that is, as capable of being performed without intent—we would effectively nullify the state of mind required by "attempted use" and "threatened use." For how could one intentionally attempt to unintentionally use force, or intentionally threaten to unintentionally use force?

Vargas-Duran, 356 F.3d at 603 (citation omitted).

B. The Legislative History Of 18 U.S.C. § 16(a) Confirms That Congress Intended The Crime Of Violence Designation To Apply Only To Intentional Offenses.

This Court has repeatedly reaffirmed that when the language of a statute is unambiguous, the Court will not look beyond the statutory language. *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 438 (1999). In this case that analysis should suffice. But should the Court look to the legislative history, all the available indicators clearly support reading the statute as requiring a showing of intentional "use of force."

Section 16 was added to the U.S. Code as part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-374, 98 Stat. 1976 ("CCCA"). The primary legislative history document associated with the CCCA is the Report of the Senate Judiciary Committee, S. Rep. No. 98-225 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182 (the "CCCA Report"). The CCCA Report notes that although "crime of violence" was used "occasionally" in "present law," *id.* at 307, 1984 U.S.C.C.A.N. at 3487, it had not previously been defined formally in the United States Code. Crucially, the phrase "crime of violence" had already been introduced into the federal legal lexicon fourteen years earlier in Section 210 of the District of Columbia Court Reform and Criminal Procedural Act of 1970, Pub. L. No. 91-358, 84 Stat. 473, 650 ("DC-CRCPA"). The DC-CRCPA, a comprehensive revision of the District of Columbia's criminal code, used the phrase "crime of violence" to designate the type of prior conviction that would empower a court to order pre-trial detention. Although the DC-CRCPA employed a categorical approach, it did not define "crime of violence" in general terms, but rather listed specific offenses that would be deemed "crimes of violence" for bail purposes.

The CCCA Report noted that offenses constituting "crimes of violence" in what is now § 16 were "essentially the same" as the offenses covered by the same phrase in the DC-CRCPA. *See* CCCA Report at 20-21, 1984 U.S.C.C.A.N. at 3203. Accordingly one may look to the offenses categorized as "crimes of violence" in the DC-CRCPA to shed light on Congress's understandings concerning the scope of the term:

> [T]he term "crime of violence" means murder, forcible rape, carnal knowledge of a female under the age sixteen, taking or attempting to take immoral, improper, or indecent liberties with a child under the age of sixteen years, mayhem, kidnapping, robbery, burglary, voluntary manslaughter, extortion or blackmail accompanied by threats of violence, arson, assault with intent to commit any offense, or an attempt or conspiracy to commit any of the foregoing offenses . . . if the offense is punishable by imprisonment for more than one year.

DC-CRCPA, Pub. L. No. 91-358, § 210, 84 Stat. at 650. Significantly, each of these offenses requires intent. Perhaps most revealing is that Congress included voluntary manslaughter, which requires intent, but excluded involuntary manslaughter, which does not.

Furthermore, the definition enacted in the CCCA in 1984 employed language identical to that employed by earlier criminal law reform bills that had been pending in Congress throughout the early 1980s. The CCCA Report records that the Judiciary Committee had taken the definition from the previous year's attempt to reform the federal criminal code. *See* CCCA Report at 307, 1984 U.S.C.C.A.N. at 3486 ("The definition is taken from S. 1630."). Senate Resolution 1630, in turn, was considered in tandem with House Resolution 6915. The Committee report for House Resolution 6915 makes clear that Congress envisioned "crimes of violence" as crimes of specific intent: "The term 'physical force' refers to 'physical action' against another. 'Action,' a variant of the term 'act,' requires affirmative, volitional behavior." H.R. Rep. No. 96-6915, at 14 (1980). This commentary further indicates that the original drafters of the definition were thinking only of volitional acts.

* * *

It is clear from both the plain language of 18 U.S.C. § 16, as well as the available legislative history, that Congress intended only specific intent offenses to qualify as "crimes of violence."[5]

III. 18 U.S.C. § 16(b) Does Not Change The Result In This Case.

A. This Case Was Decided Below Based Purely On 18 U.S.C. § 16(a), And The Interpretation And Application Of § 16(b) Is Not Properly Before This Court.

Every decision below in this case—from that of the initial Immigration Judge, the BIA, and the Eleventh Circuit in its per curiam opinion—analyzed Petitioner's status solely with reference to § 16(a). The Eleventh Circuit's holding that Petitioner's offense was a "crime of violence" was explicitly and solely premised on that Court's prior decision in *Le* v. *Attorney General*, 196 F.3d 1352 (11th Cir. 1999). *See Leocal* v. *Attorney Gen.*, 02-14992, slip op. at 3 (11th Cir. June 30, 2003). *Le*, in turn, expressly declined to reach the issue of how Florida's DUI statute would be evaluated under § 16(b). *Le*, 196 F.3d at 1354 ("We need not address that

[5] The INA further demonstrates that Congress plainly recognized that DUI offenses in particular are *not* encompassed within § 16's definition of "crime of violence." In 1990, the same Congress that added § 16 to the aggravated felony definition carefully distinguished between § 16 and DUI involving injury. It did so in a provision that added a ground of inadmissibility limiting diplomatic immunity in cases involving a "serious criminal offense." *See* Pub. L. No. 101-246, 104 Stat. 15 (1990). That amendment defines serious criminal offense as "(1) any felony, (2) any crime of violence as defined in [18 U.S.C. § 16], or (3) any crime of reckless driving or of driving while intoxicated . . . if such crime involves personal injury to another." 8 U.S.C. § 1101(h). By separately designating reckless driving and DUI offense with injury in subparagraph (3) after already designating all § 16 "crime of violence" convictions in subparagraph (2), Congress clearly demonstrated that it did not think of DUI with injury as a crime of violence within § 16. Otherwise the separate delineation of that offense would have been wholly unnecessary.

argument [whether § 16(b) applied] here . . . ."). Nor has the Eleventh Circuit or any district court in that circuit yet considered the issue of whether Florida DUI falls within § 16(b). Because no court or other adjudicator has yet to pass on whether petitioner's offense satisfies the requirements of § 16(b), this Court—in the event it agrees that Florida DUI does not fall within § 16(a)—should not itself evaluate in the first instance whether Florida DUI is a "crime of violence" under § 16(b). Consideration by this Court should properly wait until there has been lower-court consideration of that issue. *E.g., Auciello Iron Works, Inc.* v. *NLRB*, 517 U.S. 781, 784 n.2 (1996) (declining to address issue not adjudicated in decision under review). Deferral is particularly advisable because the § 16(b) issue may turn on how courts of the state in question have construed or applied the particular criminal statute (here, Florida DUI) that could be considered to be a "crime of violence."[6]

B. Should This Court Review The Application Of § 16(b) To The Florida DUI Statute, It Should Hold, With The Majority Of Circuits, That (i) Courts Must Employ A Categorical Analysis, And (ii) Only Offenses That Require *Mens Rea* Of Intent Are "Crimes Of Violence."

1. Section 16(b)'s focus on the "nature" of the offense requires a categorical analysis.

In § 16(b), Congress provided that certain offenses might constitute "crimes of violence" by virtue of the "nature" of the offense. 18 U.S.C. § 16(b) (defining "crime of violence" as a felony that "by its nature, involves a substantial risk that physical force may be used in the course of committing the offense"). Because a court must decide

[6] Notably, the United States has recognized that the case presented only issues under § 16(a). *See* Brief For Respondents In Opposition To Certiorari 7-8 ("This case presents *only* an application of Section 16(a). . . . The application of Section 16(b) to petitioner's Florida conviction is an issue that has not been addressed below and, accordingly, should not be reviewed by this Court." (Emphasis in original)).

whether an offense by its nature involves a substantial risk that physical force may be used, courts have logically looked to the intrinsic nature of the offense rather than the factual circumstances surrounding a specific violation.[7] Under this approach, often referred to as the "categorical approach," courts focus on " 'the minimum criminal conduct necessary to sustain a conviction under a given statute.' " *Dalton* v. *Ashcroft*, 257 F.3d 200, 204 (2d Cir. 2001) (internal quotations omitted). This focus on the minimum conduct necessary to sustain a conviction is appropriate, because if any conduct that would sustain a conviction nonetheless would not meet the definition of "crime of violence," then it cannot be said that the offense "by its nature" comes within the definition. Either a crime is violent "by its nature," or it is not.

A useful illustration of this categorical analysis is supplied by the Second Circuit's decision in *Dalton*, which considered whether New York's Driving While Intoxicated ("DWI") statute, N.Y. Veh. & Traf. L. § 1192.3, "by its nature" involved the risk of the use of physical force. *See Dalton*, 257 F.3d at 205. Looking to state decisional law, the court noted that under the New York statute "a defendant can be found guilty of driving while intoxicated even if he or she is asleep at the wheel of a car whose engine is not running and . . . the vehicle never moved," *id.* (citing *People* v. *Marriott*, 325 N.Y.S.2d 177, 178 (App. Div. 1971)), or if the defendant did not know how to operate the vehicle, *id.* (citing *People* v. *Prescott*, 745 N.E.2d 1000 (N.Y. 2001)), or if the vehicle itself was completely inoperative, *id.* (citing *People* v. *David "W."*, 442 N.Y.S.2d 278 (App. Div. 1981)); *cf. supra*

[7] Every circuit to confront this issue has adopted the "categorical approach" outlined above. *See Omar* v. *INS*, 298 F.3d 710, 714 (8th Cir. 2002); *United States* v. *Chapa-Garza*, 243 F.3d 921, 924 (5th Cir. 2001); *Tapia-Garcia* v. *INS*, 237 F.3d 1216, 1221-1222 (10th Cir. 2001); *Ramsey* v. *INS*, 55 F.3d 580, 583 (11th Cir. 1995) (per curiam); *United States* v. *Winter*, 22 F.3d 15, 19 (1st Cir. 1994); *United States* v. *Aragon*, 983 F.2d 1306, 1312 (4th Cir. 1993); *United States* v. *Dunn*, 946 F.2d 615, 620 (9th Cir. 1991).

pp. 13-14 (discussing analogous Florida cases). The Second Circuit therefore concluded that it would be unreasonable to find that the New York statute by its nature entailed a substantial risk of the use of force, because the statute applied to conduct in circumstances that *precluded* the use of force. 257 F.3d at 205-206.

2. Like § 16(a), § 16(b) only applies to offenses with a *mens rea* of specific intent.

Section 16(b) establishes, *inter alia*, that an offense is not a "crime of violence" under that provision unless the offense, "by its nature, involves a substantial risk that physical force may be used." As we have noted, the word "use," as construed by this Court in line with its ordinary meaning, conveys intentional action. *See supra* pp. 14-17. For this reason, as the clear majority of circuits have held, an offense does not fall within § 16(b) unless, by its nature, there is a substantial likelihood that the violator will have acted intentionally in applying physical force to the person or property of another. *Dalton*, 257 F.3d at 206-207 ("[A] crime of violence must involve the *application* of force." (Emphasis in original)); *Bazan-Reyes* v. *INS*, 256 F.3d 600, 611 (7th Cir. 2001) (Section 16(b) "only applies when the nature of an offense is such that there is a substantial likelihood that the perpetrator will *intentionally* employ physical force" (emphasis in original; internal quotations omitted)); *United States* v. *Chapa-Garza*, 243 F.3d 921, 925, 927 (5th Cir. 2001) (concluding that "ordinary meaning of the word 'use' " requires that § 16(b) only describes offenses where there is substantial likelihood of intentional use of force).

Congress's decision to define "crime of violence" must therefore be treated as deliberate. Congress could easily instead have focused not on the defendant's conduct, but on the risk of injury or harm, as it has in making other statutory classifications. Section 16(b)'s focus on the "*risk* that physical force *will be used*" thus compels a reviewing court to determine whether the offense in question presents a substantial risk that the defendant will *use force*, meaning intentionally. *See United States* v. *Lucio-Lucio*, 347 F.3d

1202, 1206 (10th Cir. 2003); *Dalton*, 257 F.3d at 206; *Bazan-Reyes*, 256 F.3d at 611; *Chapa-Garza*, 243 F.3d at 927.

Thus, for example, burglary of a home presents an example of a crime that may fit within § 16(b). Burglary of a home by its nature presents the risk of intentional use of force against a person. As this Court has explained, "[t]he fact that an offender enters a building to commit a crime often creates the possibility of a violent confrontation between the offender and an occupant, caretaker, or some other person who comes to investigate. And the offender's own awareness of this possibility may mean that he is prepared to use violence if necessary to carry out his plans or to escape." *Taylor* v. *United States*, 495 U.S. 575, 588 (1990).

In sharp contrast, DUI does not carry the same inherent risk of *intentional* use of force. Accordingly, a number of courts to consider the application of § 16(b) to state DUI statutes have held that these statutes are not "crime[s] of violence" under § 16(b). This has been so both in cases where the statute at issue has contained an "injury causation" element, *see Bazan-Reyes*, 256 F.3d at 611, as well as in cases where it has not, *see Dalton*, 257 F.3d at 206-207; *Chapa-Garza*, 243 F.3d at 926-927. As these courts have recognized, while drunken driving entails a risk of injury-causing impact, and while this risk is clearly substantial in those cases where injury-causation is an element of the offense, that risk is distinct from the risk that the intoxicated driver will have *intentionally* initiated that contact. And where, as is most often the case, the DUI statute does not contain an element requiring that state of mind, it cannot be said that there is a substantial risk of intentional application of force. To the contrary, the essence of drunk driving is that, when it results in injuries, it does so not as a result of volitional steps, but as a result of impairment.

The Seventh Circuit's discussion of this point is particularly instructive. In *Bazan-Reyes*, the court vacated the deportation order of a petitioner convicted of Wisconsin Homicide by Intoxicated Use of a Vehicle. The court rejected the government's argument that "§ 16(b) covers all felonies that

involve a substantial risk of one object exerting force on another," and affirmed instead that § 16(b) was directed towards a defendant's conduct. 256 F.3d at 610. As the court explained, "[s]ection 16(b) is focused on the defendant's conduct *itself*, as there is no requirement that there be a substantial risk that another's person . . . will sustain injury, but only that . . . the defendant will *use* physical force . . . ." *Id.* (emphasis in original). To determine whether an offense is a violent crime based on the consequences of the offending conduct would mean that § 16(b) "would include many offenses that are not generally thought of as violent crimes." *Id.* This approach is consistent with that in other DUI cases. *See Dalton*, 257 F.3d at 206-207; *Chapa-Garza*, 243 F.3d at 926-927; *cf. United States* v. *Doe*, 960 F.2d 221, 225 (1st Cir. 1992) (Breyer, J.) (contrasting DUI with violent felonies, "which call[] to mind a tradition of crimes that involve the possibility of more closely related, active violence").

The few courts that have read § 16(b) to apply to drunk-driving statutes have focused on the wrong risk. For example, in *Tapia-Garcia* v. *INS*, the Tenth Circuit held that the Idaho drunk driving statute was a "crime of violence" because driving while intoxicated presented a "risk of injury." 237 F.3d 1216, 1222-1223 (10th Cir. 2001) (internal citations omitted). The Tenth Circuit subsequently disavowed the holding and logic of *Tapia-Garcia*. *Lucio-Lucio*, 347 F.3d at 1203-1204; *see also Dalton*, 257 F.3d at 208 n.9 (distinguishing *Tapia Garcia* because it confuses risk of injury with risk of the use of force).[8]

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[8] The Ninth Circuit committed a similar error in the non-DUI case of *Park* v. *INS*, 252 F.3d 1018, 1023-1024 (9th Cir. 2001), in which it held that a *mens rea* of recklessness was sufficient to satisfy § 16(b). That result is inconsistent with the natural construction of "use" adopted by this Court. Notably, in *United States* v. *Trinidad-Aquino*, the Ninth Circuit refused to extend its construction of § 16(b) to crimes of negligence (in that instance, California's DUI statute, Cal. Veh. Code § 23153). The court recognized that "use" contained a volitional element that placed negligence crimes outside of § 16(b)'s scope. 259 F.3d 1140, 1145 & n.2 (9th Cir. 2001) (citing several dictionary definitions).

The Eighth Circuit was similarly incorrect to hold that a purely non-volitional exertion of force may qualify as a "use."[9] *See United States* v. *Gonzalez-Lopez*, 335 F.3d 793, 797-798 (8th Cir. 2003) (concluding that "use" required only "action" with no specific *mens rea* element); *see also Omar* v. *INS*, 298 F.3d 710, 720 (8th Cir. 2002). In *Omar*, the Eighth Circuit concluded that Minnesota's Vehicular Homicide statute, Minn. Stat. § 609.21, was a "crime of violence" because "there are no circumstances where the offense of criminal vehicular homicide does not present a substantial risk that physical force *will injure another*." 298 F.3d at 718 (emphasis added). Again, the *Omar* court's conclusion is premised—explicitly in this instance—on the confusion of "use of force" with "causation of injury."

Several courts of appeals called upon to interpret 18 U.S.C. § 16(b) have found the Sentencing Commission's revision of U.S.S.G. § 4B1.1 instructive. U.S.S.G. § 4B1.1 enhances sentences for recidivist violent offenders. It defines a crime of violence as any offense punishable by more than one year of imprisonment that, *inter alia*, "otherwise involves conduct that presents a serious potential risk of physical injury to another." U.S.S.G. § 4B1.2(a)(2). As these courts have noted, contrasting this broad language to the narrower "use of force" language in both provisions of § 16 highlights the importance of differentiating between the use of force and causation of harm. As the Fifth Circuit has put the point:

> Guideline 4B1.2(a)(2)'s otherwise clause concerns only the risk of one particular *effect* (physical injury to another's person or property) of the defendant's conduct. Section 16(b) is focused on the defendant's conduct *itself*, as there is no requirement that there be a substantial risk that another's person or property will sustain injury, but only that there be a substantial risk that the defendant will *use* physical force against another's person or property.

Chapa-Garza, 243 F.3d at 925 (emphasis in original); *see also Lucio-Lucio*, 347 F.3d at 1207 (refusing to "collapse the distinction between" § 16(b) and U.S.S.G. 4B1.2(a)(2)); *Jobson* v. *Ashcroft*, 326 F.3d 367, 373 n.5 (2d Cir. 2003); *In re Sweetser*, 22 I. & N. Dec. 709 (BIA 1999). The contrast between the two provisions makes clear that Congress could have focused the "crime of violence" inquiry on effects rather than conduct, had it wished. Congress's decision not to do so must be given weight.

Furthermore, the "use of force" expression that appears in both § 16(a) and § 16(b) must be given the identical construction. Thus, a determination that Florida DUI falls outside of the scope of § 16(a) on the ground that § 16(a) contains an intent requirement necessitates the conclusion that § 16(b)'s "use of force" formulation be given the same meaning. *See, e.g., Bazan-Reyes*, 256 F.3d at 611 (determination that § 16(a)'s "use" means intentional availment "requires that the words 'may be used' in § 16(b) also contain an intent requirement").

IV. Any Lingering Ambiguity In The Language Of § 16(a) And § 16(b) Should Be Construed In Light Of The Rule Of Lenity.

As amici have explained above, the plain language of both § 16(a) and § 16(b) makes clear that the Florida statute at issue in this case lacks the critical provisions to fall with the definition of a crime of violence aggravated felony. But should the Court find any ambiguity in the language of the statute, any such ambiguity should be resolved to avoid the harsh effects of labeling an offense as a "crime of violence."

This Court is being asked to construe a criminal statute that also has serious consequences for immigration law. In both contexts, this Court has long followed a rule of lenity when it faces any statutory ambiguities. *Compare Cleveland* v. *United States*, 531 U.S. 12, 25 (2000) (reaffirming

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[9] *United States* v. *Santana-Garcia*, 211 F.3d 1271, 2000 WL 491510 (6th Cir. Apr. 18, 2000) (stating, without discussion, that DUI offense resulting in death was a "crime of violence"), does not explicitly address what, if any, *mens rea* is needed for an offense to be a "crime of violence."

rule of lenity in construing criminal statutes), *with INS* v. *St. Cyr*, 533 U.S. 289, (2001) (applying " 'the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien.' " (quoting *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 449 (1987))). As the Court has explained, "[w]e resolve the doubts in favor of that [more narrow] construction because deportation is a drastic measure and at times the equivalent of banishment or exile." *Tan* v. *Phelan*, 333 U.S. 6, 10 (1948) (internal quotation omitted).

In this case, the potential consequences could not be more severe. The INA metes out particularly harsh treatment for those whose convictions are classified as "aggravated felonies." Prior to deportation, these persons are subject to mandatory detention, 8 U.S.C. § 1226(c), without any individualized review of their dangerousness or risk of flight. *Demore* v. *Kim*, 538 U.S. 510, 531 (2003). While detained, they can pursue limited claims, such as claims that they are actually citizens. But they cannot seek cancellation of removal, which would permit an evaluation of the equities of their cases, 8 U.S.C. § 1229b(a), or asylum, *id.* § 1158(b)(2)(A)(ii). Once deported, they face a lifelong bar on returning to the United States. *Id.* § 1182(a)(9)(i). These extreme consequences require that Congress make its intent clear. Far from suggesting the intent to impose such consequences in this case, Congress chose words that make clear that the crime for Mr. Leocal was convicted should not be treated as a "crime of violence."

CONCLUSION

For the reasons set forth above, the judgment of the Eleventh Circuit should be reversed and the Order of Removal should be vacated.

Respectfully submitted,

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